161 U.S. 208

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~173~~. 429

SANTIAGO AINSA, ADMINISTRATOR WITH THE WILL ANNEXED OF FRANK ELY, DECEASED, ET AL., APPELLANTS,

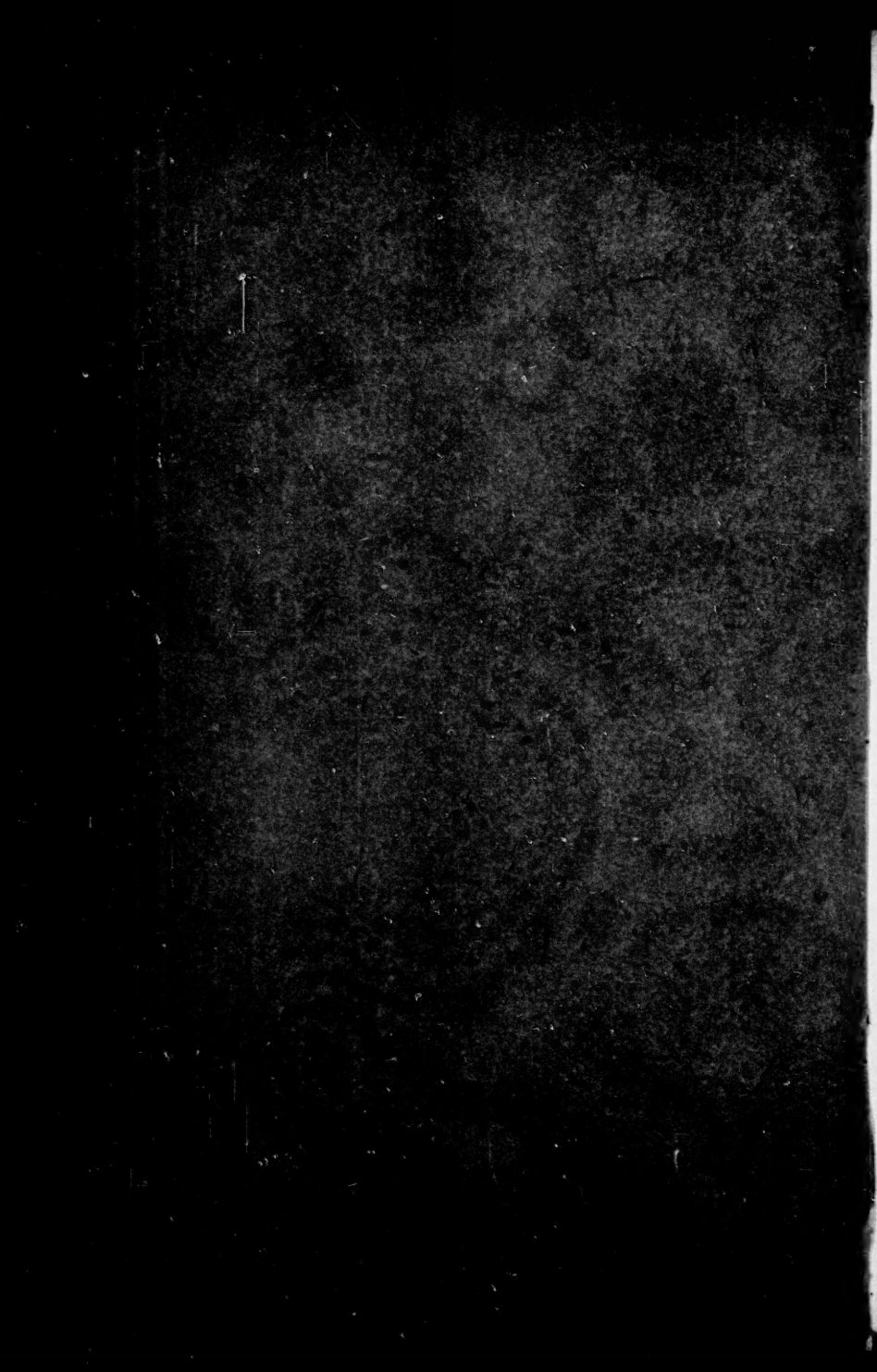
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

FILED AUGUST 6, 1894.

(15,657.)



(15,657.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 773.

SANTIAGO AINSA, ADMINISTRATOR WITH THE WILL ANNEXED OF FRANK ELY, DECEASED, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

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1 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

Be it remembered that heretofore, to wit, on the fifteenth day of August, A. D. 1892, at the city of Santa Fé, in the Territory of New Mexico, in the court of private land claims, the following proceedings were had, to wit:

The United States attorney made the statement to the court that he has received instructions from the Attorney General, head of the Department of Justice, to file a petition against the claimants of the Nogales de Elias grant, situated in the Territory of Arizona, to have the said claimants to appear, severally or collectively, and show cause why said alleged grant should not be declared null and void, in order that the title to said land may be quieted and forever settled. In pursuance of said order he offered to file a petition in behalf of the United States against the claimants of the said Las Nogales de Elias grant, and asked leave and consent of the court so to do; and the court, upon hearing the said petition and being fully satisfied the same was in accordance with the third subdivision of sec. 8 of the act approved March 3rd, 1891, allowed same to be filed.

The United States attorney thereupon announced that he would later, by motion, apply for such service as the court would deem sufficient and proper in order that said defendants may be made cognizant of and compelled to waive answer and demur to said petition.

2 And be it further remembered that on the said day, viz., the fifteenth day of August, A. D. 1892, the United States attorney filed in the office of the clerk of said court, at Santa Fé, New Mexico, a petition in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fé District, August 15th, A. D. 1892.

Los Nogales de Elias grant.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased; Jean Pierre Camou, Jose Pierson, The New Mexico and Arizona Railroad Company (a Corporation), Luisa Romero, Alberto Elias, Eurique Elias, Esperenza Elias, Guadalupe Rothenhausler, Francisco Elias, Francisco Bedoya, Carmelita Aguirre, Antonio Campilla, Anita Padilla and Her Husband, Ismael Padilla; Victoria Campilla, Carlos Elias, M. Elias, Anita Campillo, Helena Elias, Gilebaldo Elias, and Refugio Elias, Defendants. } No. 29.

To the chief justice and associate justices of the court of private land claims, sitting at Santa Fé, New Mexico:

Comes now the United States, by its attorney, under the di-
3 rections and order of the Attorney General, the head of the

Department of Justice, and presents this its petition against the defendants above named, and, informing the court, says:

That it is informed and believes, and so charges, that the defendants and each of them hold and are asserting a claim to certain lands situated in the county of Pima, in the Territory of Arizona, described and designated as follows, viz:

All land lying north of the south line of the Territory of Arizona and south of a claim in said Territory and county known as the "Calabassas claim" and west of a claim in said Territory known as the "Buena Vista claim" and extending westwardly about — varas, said claim being more particularly known and designated in the community and Territory as "Los Nogales de Elias claim."

That the claim of the defendants and each of them, as the plaintiff is informed and believes, and so charges, is derived or pretended to be derived from one Jose Elias, who is long since dead and whose claim is based, as the plaintiff is informed, upon a certain paper purporting to be a copy of an original abstract or expediente of title which, it is claimed, was, on April 20th, 1858, in the possession of said Jose Elias.

A copy of said petition in the Spanish language, also a translation of the same into the English language, being filed herewith and marked respectively (in red ink) No. 1 and No. 2.

4

That the title of said defendants and the title of each of them is open to question in this, to wit:

I.

That the property described in and claimed under said so-called expediente was, in the years 1842 and 1843, the time when said alleged grant purports to have been made, the property of the Mexican nation and not the property of the State of Sonora, and said abstract does not show or attempt to show that the Mexican nation or any officer thereof or any one lawfully authorized to act for said nation ever made any grant whatever to said land.

II.

That it does not appear by said abstract that the alleged sale or grant under which defendants claim was ever approved by the board of the treasury of the Mexican nation, which said approval was required by the laws, usages, and customs of the Mexican nation in force at the date of said alleged grant.

III.

That said alleged sale or grant was never approved by the board of the treasury of the State of Sonora, which said approval was required by the laws, usages, and customs of the Mexican Nation in force at the date of said alleged grant.

IV.

That said alleged sale or grant was never approved by the Mexican nation or by any officer thereof or by any person who had lawful authority to approve the same for said Mexican nation; which approval was required by the laws, usages, and customs of the Mexican nation in force at the time of said alleged grant.

V.

That if, as a fact, any sale was made or attempted to be made the same was incomplete and imperfect on November 25th, 1853, and was, by an order of the Mexican government made on said last-named day, disapproved, cancelled, and declared null and void.

VI.

That it was required by the laws, usages, and customs of the Mexican government in force at all times from 1842 to December 30th, 1853, that every person who received a grant of public land should immediately take possession of the same and should place at the corners thereof monuments, by which the same could be designated from other portions of the public domain; that neither said Jose Elias nor any one for him at any time prior to December 30th, 1853, had ever taken possession of said land nor had he put thereon any monuments whatever by which it could be designated from other land.

VII.

That the recitals in said alleged abstract as to the survey alleged to have been made in 1842 are false and fraudulent.

VIII.

That said paper called an abstract is not verified by the signature of any officer authorized to give abstracts or expedientes of title.

IX.

That it was required by the laws, usages, and customs of Mexico in force at all times from 1842 to 1853 that at all sales of public lands the history of the proceedings, including the approval of the proper authorities, should be deposited in the archives, and this constituted the "records" of the title. Of this original history or matrix, as it was called, a copy, duly certified by the officer making the grant, was required to be delivered to the grantee, and this copy, or transcript, or abstract, or expediente, or second original, by all of which names it was known, was the evidence of title which the grantee had and retained and was the only lawful or valid evidence which he could introduce to show that the government had parted with its title, and the said transcript or expediente was required to be taken from the original or matrix,

which remained in the archives, as above stated, or the same was void; that the alleged expediente or transcript on which defendants base their claim is not and does not purport to be a copy of any original matrix or of any instrument in the archives of Mexico or of the State of Sonora, but only purports to be a copy of an original private paper in the possession of Jose Elias, the grantee, and is on its face fraudulent, null, and void.

X.

That it was in the year 1842, being the date of said alleged grant, required by the laws, usages, and customs of Mexico and of all the States thereof that land when surveyed preparatory to a sale thereof *that land when surveyed preparatory to a sale thereof* should be surveyed in a square—that is to say, commencing at a point in the center of the proposed tract, lines were required to be measured an equal distance in each direction—and that no valid grant or sale could be made of any tract of land not so surveyed or in any different form; that the alleged survey which is claimed was the basis of said alleged grant was not made in the manner required, as above stated, and was irregular in form, being 340 varas long and 222 varas wide, and for that reason the said alleged survey, sale, and grant were and are irregular and void.

8 XI.

That it was required by the laws, usages, and customs of Mexico at the date of said alleged grant that when it was sought to denounce or purchase lands that the sale thereof should be preceded by a lawful survey, made pursuant to an order previously made by lawful authority; that previous to the commencement of the survey the commissioner so ordered to make the same was required to call all the neighbors to attend such survey.

That in making the alleged survey which was the foundation of said alleged grant the commissioner who purports to have made the same fails to show in his report that he called all the neighbors, in this, to wit, that the Buena Vista property and the Santa Barbara properties adjoined the said alleged claim, and by said report it appears that the proprietors of neither of said claims were called, as required by said laws, but only that he called the proprietor of the Casita grant, who was his father, and of the Calabassas grant, who was also his relative, and hence said survey, sale, grant, and expediente is fraudulent, irregular, and void.

XII.

That said alleged sale or grant purports to be a sale or grant by quantity and not by boundaries—that is to say, it purports to be a sale of seven and one-half sitios of land located within certain boundaries.

9 That said land purports to have been sold at a certain price per sitio, and not at a fixed amount for the entire tract.

That the land contained within the outside boundaries of said claim measures about thirteen sitios, being about five and one-half sitios in excess of the quantity claimed to have been purchased, about nine sitios of which are south of the south line of the Territory of Arizona and within the Republic of Mexico, and about four sitios are north of said line and within the United States.

It is informed and believes, and so charges, that in the year 1886, upon the application of the defendants herein and those under whom they claim, the government of Mexico confirmed the claim to the full original amount of land claimed to have been purchased by Jose Elias—that is to say, to the amount of seven and one-half sitios; all of which land so confirmed to said defendants is within the limits of the original claim of said Elias and is within that portion thereof lying south of the south boundary line of the Territory of Arizona and within the Republic of Mexico; and having thus confirmed to said defendants the said full amount of land covered by their original claim, the said government of Mexico sold so much of the surplus or demasias as was situated south of said territorial line and within the Republic of Mexico, and that that portion of said claim lying within the United States is a surplus in
10 excess of the amount originally claimed by said Elias, even conceding that he had a claim to seven and one-half sitios of land, as is alleged.

That defendants have applied for and have accepted said confirmation and are now estopped to say that the land so claimed to have been purchased is within the present limits of the United States.

That the Mexican government has made good said alleged sale and grant to the full extent claimed, and this plaintiff is not bound by law or equity to give to defendants any of its domain, as their claim, if any they ever had, has been fully satisfied by the Mexican government.

XIII.

That said pretended sale purports to have been made during the year- of 1842 and 1843, but at the time said sale is alleged to have been made the Bases of Tacubaya were in force, during which time the government of Mexico was not only central, but dictatorial, and the title to no public lands in Mexico could then pass except by the action of the central or dictatorial government.

That no such action has ever been had, and hence said alleged sale and grant *is* void.

XIV.

That the said grant does not appear of record in the proper records of the Mexican government or of the State of Sonora, in
11 that there is not in the archives of *of* said nation or State any original matrix or history of the title, as was required by the laws, usages, and customs of Mexico.

XV.

That it was required by the laws, usages, and customs of Mexico that juridicial possession should be delivered to every grantee of public land—that is, that public pedal possession should in every case be delivered to each grantee by a judicial officer, and that no valid grant could be made without such delivery of possession.

That no such possession was ever delivered to said Jose Elias or to any one for him, and that said grant is for that reason null and void.

XVI.

That by the terms of said alleged grant itself it was provided that said grantee should not remain out of possession of said property for three years in succession, and if he did so remain out of possession for three successive years the land was subject to forfeiture by the government or denounc-ment by another colonist.

That neither said Jose Elias or any one for him was ever in possession of said property or any part thereof at any time from
12 1842 until November 25th, 1853, and on said last-named day the government of Mexico by its decree declared said land forfeited, and then and there became possessed of a perfect title thereto, and within a few days thereafter sold and ceded the same to the United States for a large and valuable consideration, relieved of any and all claims whatsoever.

Wherefore it prays that the court may order and direct that such notice as to the court may seem reasonable and proper be given the defendants to show cause why said alleged grant should not be declared null and void, and that said cause may be proceeded with in conformity with the act of March 3, 1891, creating and establishing the court of private land claims in order that the title to said land may be quieted and forever settled, and for ssuch other and further orders as to the court from time to time may seem mete and proper.

MATT. G. REYNOLDS,
U. S. Attorney.

(Endorsed as follows:) No. 29. File No. 1. United States of America, plaintiff, *vs.* Santiago Ainsa, adm., and others. Petition. Filed in my office this 15th day of August, 1892. James H. Reeder, clerk, by Irenio L. Chaves, deputy.

13 And be it further remembered that on the twelfth day of September, A. D. 1892, a summons was issued by the clerk of said court; which said summons, with the endorsements thereon of proof of service and of filing, is in the words and figures following, to wit:

14 *Summons.*

UNITED STATES OF AMERICA, } ss:
District of New Mexico, }

In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA, Plaintiff,
versus
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, and Others, Defendant-.

Petition Filed in the Clerk's Office this Fifteenth Day of August, A. D. 1892.

The President of the United States of America to Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, Greeting:

You and each of you are hereby notified that an action has been brought in said court by United States of America, plaintiff, against you, as defendant, under the provisions of the act of Congress of the United States entitled "An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories," approved March 3d, 1891, the general nature and purpose of which is to test the validity of the title to what is known as the Los Nogales de Elias grant, situate in the county of Pima, in the Territory of Arizona, under what is claimed to be a grant from the State of Sonora to one Jose Elias, dated in the year 1842, and you are required to appear and plead, demurr or answer, to the petition filed in said action in said court within thirty days after the service of this notice upon you.

Witness the Honorable Joseph R. Reed, chief justice of the court of private land claims, and the seal of the said court, at the [SEAL.] city of Santa Fé, in said district, this twelvth day of September, A. D. 1892, and of the Independence of the United States the 116 year.

JAMES H. REEDER, *Clerk,*
By IRENEO L. CHAVES,
Deputy Clerk.

15 [Endorsed:] Gen. No., 29. U. S. court of private land claims, district of New Mexico. United States of America, plaintiff, *versus* Santiago Ainsa, administrator, & others, defendants. Summons. Filed this 21st day of February, A. D. 1893. James H. Reeder, clerk, by R. L. Long, deputy clerk. Matt. G. Reynolds, U. S. attorney, for plaintiff.

Proof of Service.

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

TUCSON, A. T., *September 19th, A. D.* 1892.

I hereby certify that I received the within writ on the 19th day of September, A. D. 1892, and that I have personally served the same upon the said defendant, Santiago Ainsa, by delivering to him, Santiago Ainsa, *and each of them*, personally, a true copy of the within writ at the time and place as follows: As to Santiago Ainsa, at Tucson, county of Pima, on the 19th day of September, A. D. 1892; as to —— ——.

This writ therefore returned, as the law directs, this 19th day of September, A. D. 1892.

R. H. PAUL, *Marshal,*
By —— ——,
Deputy Marshal.

Marshal's Fees.

Service, 1 defendants, at —	$4 00
Mileage, 1 mile, at —, going only	12
Total	$4 12

Paid by —— ——.

16 And be it further remembered that on the twelvth day of September, A. D. 1892, a summons was issued by the clerk of said court; which said summons, with the proof of service thereof and all endorsements thereon, is in the words and figures following, to wit:

17 *Summons.*

UNITED STATES OF AMERICA, } ss:
District of New Mexico, }

In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA, Plaintiff,
versus
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, and Others, Defendant-.

Petition Filed in the Clerk's Office this 15 Day of August, A. D. 1892.

The President of the United States of America to the New Mexico and Arizona Railroad Company (a corporation), Greeting:

You and each of you are hereby notified that an action has been brought in said court by The United States of America, plaintiff, against you, as defendant, under the provisions of the act of Con-

gress of the United States entitled "An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories," approved March 3d, 1891, the general nature and purpose of which is to test the validity of the title to what is known as the Los Nogales de Elias grant, situated in the county of Pima, in the Territory of Arizona, under what is claimed to be a grant from State of Sonora to one Jose Elias, dated in the year 1842, and you are required to appear and plead, demurr or answer, to the petition filed in said action in said court within thirty days after the service of this notice upon you.

Witness the Honorable Joseph R. Reed, chief justice of the court of private land claims, and the seal of the said court, at the [SEAL.] city of Santa Fé, in said district, this twelfth day of September, A. D. 1892, and of the Independence of the United States the 116 year.

JAMES H. REEDER, *Clerk*,
By IRENEO L. CHAVES,
Deputy Clerk.

18 [Endorsed:] Gen. No., 29. U. S. court of private land claims, district of New Mexico. United States of America, plaintiff, *versus* Santiago Ainsa, administrator, and others, defendant-. Summons. Filed this 21st day of February, A. D. 1893. James H. Reeder, clerk, by R. L. Long, deputy clerk. Matt. G. Reynolds, *of* U. S. attorney, for plaintiff.

Proof of Service.

UNITED STATES OF AMERICA, *ss:*

TUCSON, A. T., *Sept. 29th, A. D.* 1892.

I hereby certify that I received the within writ on the nineteenth day of September, A. D. 1892, and that I have personally served the same upon the said defendant, William Herring, the attorney-in-fact of the New Mexico and Arizona Railroad Company, by delivering to him, in the town of Phœnix, A. T., *and each of them*, personally, a true copy of the within writ at the time and place as follows: As to New Mexico Railroad Co., at Phœnix, county of Maricopa, A. T., on the 27th day of September, A. D. 1892; as to

——— ———.

Due service of the within petition is hereby admitted this 27th day of Sept., 1892.

THE NEW MEXICO AND ARIZONA
RAILROAD COMPANY,
By its attorney, WILLIAM HERRING.

This writ therefore returned, as the law directs, this 27th day of September, A. D. 1892.

R. H. PAUL, *Marshal.*

19 & 20 And be it further remembered that thereafter, on the 21st day of February, A. D. 1893, there was filed in the office of the clerk of this court, at Tucson, Arizona, an affidavit; which affidavit is in the words and figures following, to wit:

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Office of The Arizona Citizen.

Herbert Brown, being duly sworn, deposes and says that the notice hereto annexed was published correctly for six successive times in the regular and entire issue of every number of The Arizona Daily Citizen, a newspaper published in Tucson, Pima county, Arizona, and of general circulation; that the first publication of said — was on the 6th day of Sept., 1892, and the last publication thereof was on the 31st day of Dec., 1892, and that he is one of the publishers of said Arizona Citizen.

HERBERT BROWN, *Manager.*

Subscribed and sworn to before me this 4 day of February, 1893.

[Seal Notary Public, Pima County, Arizona.]

WILLIAM J. OSBORN,
Notary Public.

UNITED STATES OF AMERICA, ss:

For the Court of Private Land Claims, Sitting in and for New Mexico, at Santa Fé, August 29th, A. D. 1892.

THE UNITED STATES, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, and Others, Defendants. } No. 29.

Order of Publication.

It appearing to the court upon the petition of the attorney for the United States that the following-named defendants, Jean Pierre Camou, Jose Pierson, Louisa Romero, Alberto Elias, Enrique Elias, Guadalupe Elias, Esperenza Elias, Francisco Bedoya, Carmelita Aguirre, Carlos Elias, M. Elias, Quadalupe Rothenhausler and her husband, Joseph Rothenhausler, Anita Pedilla and her husband, Esmael Pedilla, are beyond the jurisdiction of the court, and that no personal service can be had upon them—

It is ordered by this court that the aforesaid named defendants, in this cause, be and are hereby directed to plead, answer, or demurr to the petition filed on behalf of the United States herein by the 1st day of November, A. D. 1892, and that this order be published once a week for six consecutive weeks in a newspaper published in the city of Tucson, in the county of Pima, in the Territory of Arizona.

I hereby certify that the above and foregoing is a true copy of the order made by the court in the above-entitled cause, and as it is entered in the journal records of this court.

In testimony I have hereunto signed the same as clerk of the court of Pima land claims and affixed the seal of the court, at Santa Fé, New Mexico, this 29th day of August, 1892.

JAMES H. REEDER, *Clerk*,
By IRENEO L. CHAVES,
Deputy Clerk.

[Endorsed:] No. 29. F No. 6. United States *vs.* Santiago Ainsa *et als.* Proof of publication. 2, 21, '93. Filed Feb. 21, 1893. James H. Reeder, clerk, by R. L. Long, dep. clerk.

And be it further remembered that, to wit, on the 10th day of October, A. D. 1892, there was filed in the office of the clerk, at Santa Fé, New Mexico, a petition and answer; which petition and answer *is* in the words and figures following, to wit:

21 In the Court of Private Land Claims of the United States of America and for the Territory of Arizona, Sitting at Santa Fé, N. M.

THE UNITED STATES OF AMERICA, Plaintiff,
against
SANTIAGO AINSA, JUAN PIERRE CAMOU, *et al.*, Defendants.
} Answer and Petition.

To the chief justice and associate justices of the honorable court of private land claims of the United States of America:

Now comes Juan Pierre Camou, the above-named defendant, by his counsel, George Hill Howard, and George Hill Howard and say in the matter of the said complaint in the above-entitled action—

That the plaintiff had no warrant to assume that the defendants or either of them would not make and file their petition in the matter of the grant with this honorable court before the period in which they are entitled so to do under the law had elapsed. Your petitioners now make and file in this court this their petition in the matter of the private land claim Los Nogales de Elias, the subject of this action, in their own behalf and by way of full denial and answer to the complaint herein, and pray that the same may be dismissed.

Your petitioners, informing and showing the court, say:

1. That from about September, A. D. 1821, when Mexico became independent of the Kingdom of Spain, the then intendencia, embracing the province- of Sonora and Sinaloa, was formed into and called "El Estado del Occidente," or State of the West, and constituted one of the sovereign, independent States of the Mexican federation until A. D. 1830, when it was divided into the separate States of Sonora and Sinaloa.

22 2. That in the law of the said federation of August 4th, 1824, classifying the properties and revenues of the federation and the States respectively, the property and right to the vacant and public lands within their respective borders was ceded and recognized to be in the States.

3. That by article 4 of the law of August 18th, 1824, of the Mexican congress the several States were authorized and directed to form laws for the colonization of the vacant lands within their respective borders, and in a subsequent article of the same law the federal executive was authorized and directed to form regulations for the colonization of the vacant and public lands in the territories of the Republic and to dispose of the same as it might deem proper.

4. The several constitutions of the various Mexican States enunciated and declared the sovereignty of, it, and to the vacant lands within their borders to be in the said States.

5. The said State of the West, on May 20th, 1825, passed a law for the disposition and sale of the vacant lands within its borders. The preamble of the said law enunciated and declared the sovereignty of, in, and to the said lands to be in the said State and cited the aforesaid general law of August 4th, 1824, in substantiation thereof.

On the 11th day of July, 1824, the congress of the State of Sonora passed the "Ley Organica de Hacienda No. 26." This law made no very material change in the said law of 1825, except in fixing the value of the public lands.

These said acts of the said States of the West and Sonora, which were under the law sent to the general government for its cognizance and such action as it might deem proper to take thereon, were acquiesced in by the said general government.

5. By the arbitrary, revolutionary, and unconstitutional measure of the revolutionary general government of October 3rd, 23 1835, published December 29th, 1836, the States of the Mexican federation were changed to and called departments until the said federation returned to constitutional order, on the 4th of August, 1845, and the said departments resumed their former character.

Notwithstanding the aforesaid changing of the said States into departments, the method of their internal government and of the disposition of the vacant lands within their borders remained substantially the same as before; the department became successors to the States in all their rights and obligations, and the departmental congresses continued to form laws and regulations in the matter of the disposition of the vacant lands within their borders and to claim sovereignty of the same.

See the decrees of the departmental congress of Sonora of April 17th, 1837, of April 28th, 1839, and of December 24th, 1840, as well as the supreme order of December 21st, 1840.

6. Under the said laws of the said State of Sonora the treasurer general of the State sold and granted the vacant lands in behalf of the State, and issued the final titles without the necessity of reporting the same to any other authority for confirmatory action thereon.

When the said State of Sonora became a department as aforesaid the jefe superior de hacienda, or superior chief of treasury of the department, succeeded to the said treasurer general of the State and continued to exercise the same powers and attributes in the matter of the vacant lands in the department, substantially in accordance with the hereinbefore-cited laws, rules, and regulations of the State and said subsequent departmental laws upon the same subject. By the law of December 16th, 1841, the said office of superior chief of hacienda was abolished and its functions transferred to the departmental treasurer.

7. That in the year 1841 José Elias, for himself and for his parents, Francisco Gonzales and Balvenera Redondo, residents of the town of Imuris, district of San Ignacio, Sonora, Mexico, petitioned the treasurer general of the department of Sonora, Republic of Mexico, for the remeasurement of the lands of which they were owners, situated in the said district and department, known as and called La Casita rancho, to the end that if there should be found demasias or surplus lands within the boundaries as anciently surveyed it might be adjudicated to them, and also asked that the valdios (vacant lands) lying between the boundaries of the said rancho of La Casita and that of the Las Calabasas and Tumacacori mission be also measured and adjudicated to them.

8. That thereafter, to wit, on the 7th day of January, 1843, after all due and proper steps and proceedings first had under and in accordance with the laws, rules, regulations, usages, and customs of the Federation of Mexico, State and department of Sonora, then obtaining, such as the resolution and instructions of the departmental treasury board, the informe, citation to adjoining proprietors, the survey, the valuation, the public notices of sale to the best bidder, the final sale, the payment into the departmental treasury of the amount for which the tract was sold and the receipt therefor, the opinion of the attorney general, a grant was made and issued by the treasurer general of the said department of Sonora, Captain Ignacio Lopez, in the name of the Mexican nation, by way of sale, unto the aforesaid José Elias, Francisco Gonzales, a-d Balvenera Redondo, that certain tract of land petitioned for by them as aforesaid, in accordance with the prior official survey thereof, embracing the vacant lands between the northern boundary of the Casito rancho and the southwestern boundary of the mission of Tumacacori and Calabasas tract, purporting to contain seven and one-half square leagues and two short caballerias of land, or about twhi-ty-two thousand acres, situated in the then Republic of Mexico, department of Sonora and district of San Ignacio, the said tract being known as and called the "Nogales de Elias."

That on said 7th day of January, 1843, the said treasurer general of the said department of Sonora, thereunto authorized and empowered, made the said grant of the said tract unto the said grantees and issued and delivered unto them the first original testimonio expediente or titular document as evidence of final and complete title; which said testimonio was on the same day and prior to its said delivery to the said grantees recorded in the Toma de Razon, folio 64

thereof; which said Toma de Razon, or record book for land grants, then existed under the law in the departmental treasury of said department and is now existant and forms a portion of the archives of Mexico, the present State of Sonora, in the office of the treasurer general of the said State, and containing the said entry of record of the said testimonio or expediente, as hereinbefore set forth.

All of which, with the exception of the last allegation of the preceding paragraph, is set forth and fully shown in and by the said testimonio, copy thereof filed hitherto by your petitioners in the matter of this said grant claim in the United States surveyor general's office for the Territory of Arizona, now in the possession of this honorable court, to which reference is made and which petitioners pray may be filed in this cause and marked as "Exhibit A."

8. That the original expediente, or matrix, in and for the said grant from which the said original testimonio was had, made, and delivered unto said grantees, as hereinbefore set forth, remained in and formed part of the archives of the Republic of Mexico and department of Sonora, to wit, in the office of the treasury of the said department of Sonora.

9. That all the steps and proceedings in the matter of the said grant and sale of the said tract, Los Nogales de Elias, were
26 regular, complete, and lawful, and vested perfect and valid title thereto in the said grantees, who at the time went into the actual possession, use, and occupation of the same, erected the proper monuments, built ranch-houses, and pastured their herds thereon, and they and their descendants and leagl representatives have continued ever since and until the present time in the actual possession, occupation, and use of the same and are now seized and possessed in fee thereof and are entitled to a confirmation of that portion of the same which now lies in the United States.

10. That the said sale and final grant of the said tract subsequent to the said official survey thereof segregated the same from the public domain, and judicial delivery thereof was not required or necessary by the laws or customs then in force in said department of Sonora, but the local authorities in the grant itself were required and instructed to protect the grantees in the quiet and peaceable possession thereof.

11. That while the laws of Mexico may have required that lands granted should be surveyed in a square, if possible—that is to say, should there be vacant lands on all sides—the non-compliance with such requirements did not render the grant void, but voidable. The custom and practice had been for many years in Sonora prior and up to the time this grant was made, when the rights of third parties were not affected, to allow the grantees to designate and select the quantity granted in any rectangular shape desired.

12. That, as appears and is shown from and in the said official survey, the minutes whereof are contained in the aforesaid testimonio, the form of the same was nearly square, the northern and southern boundaries conforming, of necessity, angularly with these of the Casita rancho and the Tumacacori and Calabasas tract; that within

the bounds, natural objects, and monuments set forth and
27 established by the said official survey, there is an excess of
about —, more or less, some 4,631 hectaras, 21 aras, and 47 centiaras, or about — of such said excess, surplus, or demasias, being in that portion of grant lying and being in the State of Sonora, all of which is set forth and shown in the resurvey of the grant and plot thereof had and made A. D. 1886 by the Mexican government upon the petition of your petitioner, Camou, to purchase the said demasias that lay within the Republic of Mexico; which said resurvey and plot thereof and the proceedings thereon, as well as the final sale and grants by the said Republic of Mexico — petitioner Camou of the said demasias within the said Republic, and a final recognition, expressly considered and given, of the aforesaid original grant of —, made A. D. 1843 by the treasurer general of the department of Sonora, are contained, shown, and set forth in the duly authenticated original testimonio, which was made and delivered unto the said Camou by the said Republic as complete and final evidence of title, a copy of which is filed herein and herewith, marked as "Exhibit B."

That for the reason that the said original testimonio of 1886 is a necessary muniment of title for that portion of the said Nogales de Elias tract that lies in the State of Sonora and required by the laws to be kept in their possession your petitioners file the aforesaid copy thereof, but offer and will produce the same for the inspection of this court and the United States attorney and comparison with the aforesaid copy thereof.

That up to the date of the treaty known as and called the Gadsden purchase, by which the present Territory of Arizona was acquired by the United States of America from the Republic of Mexico, the whole of the said tract of Los Nogales de Elias lay within
the said State of Sonora, but that since the date of the said
28 treaty about three-fourths of the same lies in the said State
of Sonora and about one-fourth of the same in the Territory of Arizona; and your petitioners aver that they are entitled to a confirmation at the hands of this court of the whole of the portion of the said tract that lies in the Territory of Arizona, and in accordance with the metes and bounds set forth, shown in, and designated in and by the original survey and grant of the same.

14. That under and by virtue of proper and mesne conveyances your petitioners, Juan Pierre Camou and George Hill Howard, own an undivided one-half of the said grant and tract of Los Nogales de Elias, the said Camou to two-sixths and the said Howard to one-sixth of the said tract as a whole; all of which is fully shown in and by the said mesne conveyances and other documents relative thereto hitherto filed by your petitioners in the matter of the said grant in the office of the United States surveyor general of the Territory of Arizona, now, as your petitioners are informed and believe, in the possession of this honorable court, together with translations thereof, which they pray may be filed in this court as petitioners' Exhibit C, D, E, F, G, H, I, and so on.

15. Your petitioners are informed and believe that there are gold

and silver mines or lodes or minerals of the same within the limits of the said tract, but whether of value sufficient to work they are not informed. Petitioners aver that if any such gold or silver mines or lodes or minerals of the same — within the limits of the said tract they pertain, by virtue of the said grant, to them.

16. That the form of the said grant, title, or expediente so made and issued to said grantees, as hereinbefore set forth, for the said tract of land was and is a written title and grant document comprehending and showing all the steps and proceedings in the
29 matter of the grant, from the petition to and including sale and final grant; which grant document was duly made, executed, and authenticated under and in accordance with the laws, superior orders, usages, and customs then obtaining and in force in the department of Sonora and Republic of Mexico, and was and is in nature a complete, definitive, individual grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject the tract to adjudication to third parties who might apply for or denounce the same.

17. That your petitioners, about A. D. 1879, under and in accordance with the law, filed their petition and documentary evidence in the matter of the said grant for the said tract of land Los Nogales de Elias in and before the United States surveyor general for Arizona, who thereafter, to wit, on the 25th day of February, 1881, upon a full and careful examination of the documentary and oral evidence adduced in the case, rendered his decision affirming the validity of the grant to the extent of seven and one-half sitios or square leagues and two short caballerias of land, or to the portion thereof lying and being in the Territory of Arizona, and the said surveyor made his report of his said decision to the Congress of the United States and recommended the grant to be confirmed in accordance with his said decision, which report and decision *is* now in the hands of this court, as aforesaid, together with the evidence, documentary and oral, had and adduced in and before the said surveyor general in the matter of the said grant, to which petitioners refer and pray may be made part of this proceeding and cause and filed herein, and that the said evidence which by law or equity may be in the sound discretion of this court admissible and proper shall be availed of.

18. That the matter of the said grant has never been finally acted upon by Congress or under its authority, though it has
30 been considered several times by the House of Representatives favorably. See H. R. Rep. No. 192, 49 Cong., *1st* session, filed herewith as Exhibit No. 1.

That the Hon. Sec. of Int., upon a reference to the Dep. of Int. by Congress for its opinion in the matter of the said grant, rendered his favorable opinion as to the validity of the said grant, and that the same should be confirmed. See copy thereof filed herewith and marked as Exhibit 2.

That there are no adverse claimants, holders, or possessors of any

portion of the said tract in whole or in part under any other grant or claim derived from the Spanish or Mexican governments.

Wherefore your petitioners pray that the validity of the title of, in, and to the said Los Nogales de Elias tract, or to that portion of the same which lies in the United States, the extent and location thereof, may be inquired into and determined by this honorable court; that the same may be by your decree established, confirmed, and set apart to your petitioners as the legal representatives of the original grantees or to the legal representatives of the said original grantees—that is, the said portion of the said grant which lies within the United States and in accordance with the metes and bounds set forth in the original survey and grant, or for such portion of the same as the court may upon the proofs find they may be entitled to in law or equity; that a survey thereof may be made by the surveyor general of the United States under the directions and instructions of this court; that the petitioners may be granted such other and further relief in the premises as in equity and justice as to the court may seem meet and proper; and your petitioners will ever pray, etc.

JUAN PIERRE CAMOU,
By his attorney, GEORGE HILL HOWARD, AND
GEORGE HILL HOWARD,
In Propria Persona.

31 And be it further remembered that on the 11th day of October, A. D. 1892, there was filed in the office of the clerk of this court, at Santa Fé, New Mexico, an answer; which answer is in the following words and figures, to wit:

32 UNITED STATES OF AMERICA, }
District of New Mexico, } *ss:*

In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, *et al.*, Defendants.

Comes now Santiago Ainsa, as administrator, with the will annexed, of Frank Ely, deceased, by his attorney, and for answer to the petition of the United States of America herein admits that as such administrator he is holding and asserting a claim in fee to the land in Pima county, Territory of Arizona, known as the Los Nogales de Elias private land claim or grant, as set out in said petition.

Defendant denies that his title to said lands is derived from Jose Elias, as alleged in said petition, and avers that the said grant was made to José Elias and Francisco Elias Gonzales and Balvanera Redondo, parents of said José Elias, as tenants in common, and that as assignee of and purchaser from the heirs of said Francisco

Elias Gonzales and Balvanera Redondo this defendant is the lawful holder and owner in fee of an undivided one-third interest in said lands and premises.

Defendant admits that his claim is based upon the expid-ente or original title papers to said lands; which expid-ente was on January 7, 1843, executed and delivered to said Jose Elias and Francisco Elias Gonzales and Balvanera Redondo.

33 I, II, III, IV, & V.

For answer to paragraphs I, II, III, IV, & V of the petition herein defendant denies each and every allegation in each of said paragraphs contained.

VI.

Defendant denies that neither said Jose Elias nor any one for him at any time prior to December 30, 1853, had ever taken possession of said land, and denies that he had not put thereon any monuments whatever by which it could be designated from other land, but defendant avers that the grantees under said grant took possession of said lands and put thereon proper monuments, as required by law, and in every respect faithfully and truly observed the terms of said grant and faithfully and truly fulfilled the laws relating thereto.

VII & VIII.

For answer to paragraphs VII & VIII of the petitioner herein defendant denies each and every allegation in each of said paragraphs contained.

IX.

Defendant denies that the expid-ente of said grant is not and does not purport to be a copy of any original matrix or of any instrument in the archives of Mexico or of the State of Sonora, and denies that it only purports to be a copy of an original private paper, and denies that it is on its face or at all fraudulent, null, and void; and defendant avers that the said expid-ente was lawfully and duly issued in conformity with law, and that it is valid and genuine and of full force and effect.

X & XI.

34 For answer to paragraphs X & XI of the petition herein defendant denies each and every allegation in each of said paragraphs contained.

XII.

Defendant denies that the said sale or grant purports to be a sale or grant by quantity and not by boundaries, and defendant avers that the said sale or grant was a sale of all the land within the boundaries designated in the title papers of said grant, and that

the entire tract embraced within such boundaries was sold in fee to the purchasers thereof.

Defendant states that he has no knowledge whether in the year 1886, upon the application of any of the other defendants herein, the government of Mexico confirmed said grant to the amount of seven and one-half sitios or any other quantity, and defendant avers that if any such action was taken it was not upon his application or of those heirs under whom he claims title, and that neither he nor they were parties to any such application and action on the part of the Republic of Mexico; and defendant denies that he is in any way bound or estopped by any such action, if such action was taken.

XIII.

For answer to paragraph XIII of the petition herein defendant denies each and every allegation in said paragraph contained.

XIV.

Defendant denies that said grant does not appear of record in the proper records of the Mexican government of the State of Sonora, and avers that said grant was duly recorded as required by the laws and usages in existence at the time, and that the said grant
35 is now of record in the proper office in the State of Sonora.

XV.

Defendant denies that the judicial possession required by law was not delivered to the grantees or purchasers of said grant, and denies that said grant is for that or any other reason null and void.

XVI.

Defendant denies that the grantees under said grant were never in possession of said property or any other part thereof at any time from 1842 until November 25, 1853; and denies that on said last-named day or on any day the government of Mexico, by its decree, declared said land forfeited; and denies that said government then and there or at any time became possessed of a perfect title or any title thereto; and defendants avers that said premises were purchased in fee at the date of the said grant, and that they have remained the private property of the purchasers thereof, and that at the time of the treaty between the Republic of Mexico and the United States of America, to wit, the treaty of December 30, 1853, the lands embraced within the boundaries, measurements, and monuments in said title papers described were held by the grantees thereof as private property in fee by a complete and perfect title, and that they are still so held.

ROCHESTER FORD,
Attorney for Defendant Ainsa, Administrator.

(Endorsed:) Case No. 29. Filed in the office of the clerk, court of private land claims, October 11, 1892. Jas. H. Reeder, clerk, by Irenio L. Chaves, deputy.

36 And be it further remembered that thereafter, to wit, on the 24th day of October, A. D. 1892, there was filed in the office of the clerk of this court, at Santa Fé, New Mexico, an answer; which answer is in the words and figures following, to wit:

37 UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fé District, August 15th, A. D. 1892.

Los Nogales de Elias grant.

UNITED STATES OF AMERICA, Plaintiff,
against
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased; Juan Pierra Camou, José Pierson, The New Mexico & Arizona Railroad Company (a Corporation), Luisa Romero, Alberto Elias, Enrique Elias, Esperanza Elias, Guadalupe Rothenhausler and Her Husband, Joseph Rothenhausler, Francisco Elias, Francisco Bedoya, Carmelita Aguire, Antonio Campillo, Anita Padilla and Her Husband, Ismael Padilla, Victoria Campillo, Carlos Elias, M. Elias, Anita Campillo, Helena Elias, Gilebaldo Elias, and Refugio Elias, Defendants.

The New Mexico and Arizona Railroad Company, one of the above-named defendants, appear*ing* by its attorney, William Herring, and demurs to plaintiff's complaint, for the reason that said complaint does not state facts sufficient to constitute a cause of action against defendant, and defendant alleges as grounds of said demurrer that, taking the allegation contained in the sixteenth paragraph of said complaint as true, "that on November 25th, 1853, the lands in question were sold and ceded to the United States, relieved of any and all claims whatsoever"—

Said complaint fails to show that this defendant is asserting, holding, or claiming any unlawful possession, right of possession, ownership, or title of, in, or to the lands occupied, possessed, or held by defendant against the plaintiff.

38 Wherefore defendant prays that said complaint may be dismissed with costs.

Defendant, appearing by its said attorney, for answer to said complaint shows and alleges:

I.

That it is a corporation duly organized under the laws of the Territory of Arizona and is engaged in the transaction of its corporate business in the counties of Pima and Cochise, in said Territory, having its principal place of business at Benson, in said county of Cochise; that said corporate business is the operation of a steam railroad for the transportation of passengers and freight between the towns of Benson, in the county of Cochise, in the Ter-

ritory of Arizona, and the town of Nogales, in the county of Pima, said Territory, and thence across the boundary line between the United States and Mexico to the city of Guaymas, in Mexico; that defendant, from the time of its organization to the bringing of this action, has been in the due occupation and possession of the lands used and occupied by it for a right of way and the necessary sidings and buildings for the transaction of its corporate business; that the lands so occupied and possessed are rightfully held and occupied by defendant as against the plaintiff or any one claiming under plaintiff; that said occupation and possession have been taken and held and are now held after a due compliance with the laws in relation thereto by defendant.

II.

Defendant further shows and alleges that for the purposes of its right of way, its sidings and necessary buildings through or over the lands described in plaintiff's complaint, it has duly acquired and is the owner of all the right, title, interest, claim, de-
39 mand, and estate of any and all persons rightfully claiming under the said Jose Elias mentioned in said complaint any interest in the lands included within the grant described and referred to in said complaint as the "Los Nogales de Elias claim."

Defendant admits that the claim of title of the immediate grantors of defendant is based upon the expediente or original title papers to said lands, which expediente was executed and delivered to said Jose Elias and Francisco Elias Gonzales and Balvanero Redondo.

III.

Defendant denies each and every allegation contained in paragraphs I, II, III, IV, & V of the petition of the defendant.

IV.

Defendant denies that neither said Jose Elias nor any one for him, at any time prior to December 30th, 1853, had ever taken possession of said lands, and denies that he had not put thereon any monuments whatever by which it could be designated from other lands, but defendant avers that the grantees under said grant took possession of said lands and put thereon proper monuments, as required by law, and in every respect faithfully and truly observed the terms of said grant and faithfully and truly fulfilled the laws relating thereto.

V.

For answer to paragraphs VII & VIII of the petition herein, defendant denies each and every allegation in each of said paragraphs contained.

VI.

Defendant denies that the expediente of said grant is not and does not purport to be a copy of any original matrix or of

40 any instrument in the archives of Mexico or of the State of Sonora, and denies that it only purports to be a copy of an original private paper, and denies that it is on its face or at all fraudulent, null, and void, and defendant avers that the said expediente was lawfully and duly issued in conformity with law, and that it is valid and genuine and of full force and effect.

VII.

For answer to paragraphs X, XI, XII, & XIII of the petition herein, defendant denies each and every allegation in each of said paragraphs contained.

VIII.

Defendant denies that said grant does not appear of record in the proper records of the Mexican government or of the State of Sonora, and avers that said grant was duly recorded as required by the laws and usages in existence at the time, and that the said grant is now of record in the proper office in the State of Sonora.

IX.

Defendant denies that the juridical possession required by law was not delivered to the grantees or purchasers of said grant and denies that said grant was for that or any other reason null and void.

X.

Defendant denies that the grantees under said grant were never in possession of said property or any other part thereof at any time from 1842 until November 25th, 1853, and denies that on said last-named day or on any day the government of Mexico by its decree declared said land forfeited, and denies that said government then and there or at any time became possessed of a perfect title or any title thereto, and defendant avers that said premises were purchased in
41 fee at the date of the said grant, and that they have remained the private property of the purchasers thereof, and that at the time of the treaty between the Republic of Mexico and the United States of America, to wit, the treaty of December 30th, 1853, *and* the lands embraced within the boundaries, measurements, and monuments in said title papers described were held by the grantees thereof by a complete and perfect title, and that they are still so held.

Wherefore defendant prays that defendant's right, possession, and title to said lands held, occupied, possessed, and owned by defendant be adjudged good and valid.

(Signed) WILLIAM HERRING,
Attorney for the New Mexico and Arizona Railroad Company.

(Endorsed:) Case No. 29. Filed in the office of the clerk, court of private land claims, October 24, 1892. Jas. H. Reeder, clerk, by I. L. Chaves, deputy.

And be it further remembered that on the twentieth day of February, A. D. 1893, the attorney for the United States filed with the clerk of this court, at Tucson, Arizona, a demurrer; which demurrer is in the words and figures following, to wit:

42 UNITED STATES OF AMERICA, *ss:*

In the United States Court of Private Land Claims.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, with Will Annexed, of the Estate of Frank Ely, Deceased, *et al.*, Defendants. } No. 29.

Now comes the United States, by Matt. G. Reynolds, its attorney, and demurs to so much of the answer of said defendant, Santiago Ainsa, as purports to be an answer of the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 10th, and 11th paragraphs of plaintiff's petition herein and assigns as reasons and grounds of demurrer the following, to wit:

First. Because said portions of said answer are not responsive to the allegations contained in said paragraphs.

Second. Because by said portions of said answer the United States is not advised whether it is the intention of the pleader, to wit, said defendant, to deny that the requirements of the Mexican law

43 and its usages and customs are as averred in said paragraphs of said petition or whether he intends to deny a failure to comply with said requirements.

Third. If it is the intention of the pleader to deny that the requirements of the Mexican law are as averred on said paragraphs of the petition herein, said portions of said answer are insufficient in that they are indefinite and uncertain.

Fourth. If it is the intention of said defendant to deny a failure to comply with such requirements as are averred in said paragraphs of the petition herein, said portion of said answer is insufficient in that they are negative pregnant and the issue thus sought to be raised should be made of affirmative averment.

Fifth. Because said portions of said answer are evasive, indefinite, and uncertain, and upon this demurrer the plaintiff prays judgement.

MATT. G. REYNOLDS,
U. S. Attorney.

L. F. PARKER, *Of Counsel.*

Endorsement: Filed February 20, 1893. James H. Reeder, clerk, by R. L. Long, dep. clerk.

44 And be it further remembered that thereafter, to wit, on the 21st day of February, A. D. 1893, said day being the 1st day of the February term, A. D. 1893, of this court, held at Tucson, Arizona Territory—

The demurrer to the answer of defendant Santiago Ainsa was argued and submitted to the court and by the court taken under advisement.

And thereafter, on the 23rd day of February, A. D. 1893, being the 2nd day of the February term, A. D. 1893—

The demurrer to the answer of Santiago Ainsa, heretofore submitted to the court, was by the court overruled.

And be it further remembered that thereafter, to wit, on the 23rd day of February, A. D. 1893, an amended answer was filed in the office of the clerk of this court, at Tucson, Arizona; which amended answer is as follows:

45 In the Court of Private Land Claims of the United States of America and for the Territory of Arizona, Sitting at Santa Fé, N. M.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, JUAN PEDRO CAMOU, *et al.*, Defendants.

Juan Pedro Camou, by his attorney, William Herring, by leave of the court, hereby amends his answer herein and, in addition to the allegations already set forth in his answer filed herein, further alleges as follows:

I.

That the said tract or grant known and called the "Nogales de Elias" had been duly located and duly recorded in the archives of Mexico prior to the twenty-fifth day of September, referred to in article VI of the Gadsden treaty; that the grantors and predecessors in interest of petitioner, who were the owners of said grant at the time of the adoption of the treaty of Guadalupe Hidalgo and of the Gadsden treaty, were Mexicans, citizens of the Republic of Mexico.

II.

That the amount of land contained within that portion of said grant lying within the United States is twenty-five thousand eight hundred and ninety-nine and nine one-hundredths acres, and petitioner files herewith a map and survey of said grant made by F. W. Oury, showing the situation and boundaries of said grant.

III.

Petitioner further alleges that the validity of said claim and grant herein described and referred to, as examined into by the United States surveyor general for Arizona, was so examined pursuant to a law of Congress approved July 15th, 1870, and departmental instructions of January 5th, 1877.

46 That the action taken under said authorization by the said surveyor general and the results of his examination into the

origin, nature, character, and extent of said grant in said Territory under the laws, customs, and usages of Spain and Mexico are fully set out in the report made thereupon by said United States surveyor general, a certified copy of which is hereto annexed, the original thereof being in the possession of the United States. Petitioner hereby makes said certified copy a part of this answer, and prays that in the absence of the exhibits and documentary evidence therein referred to or upon the inability of the government or its failure to produce the same, that said copy may be received in evidence and accepted by this court in relation to the contents thereof.

Petitioner will duly file herein his deraignment of title in relation to said grant, showing an undivided one-half in petitioner and the other undivided one half in his co-owners, for whose benefit, as well as his own, he prays a decree establishing the validity of his title to said tract and grant.

Petitioner prays for such further relief or order as may be deemed by this honorable court just and equitable in the premises.

Dated Feb. 23rd, 1893.

JUAN PEDRO CAMOU,
By his att'y, WILLIAM HERRING.
WILLIAM HERRING,
Attorney for Petitioner.

47 *U. S. Surveyor General's Opinion and Recommendation in the Case.*

This is a grant for the exact quantity of seven and one-half square leagues and two short caballerias, notwithstanding the petition was for the vacant land lying between the northern boundary of the Casita and the westerly boundary of the ranch of Calabasas and mission of Tumacacori. It was clearly the intention of the petitioners to purchase the vacant land between the limits of the ranches named without definite easterly and westerly boundaries.

The proceedings show that, as a preliminary to the measurement of the said vacant land, the remeasurement of the Casita was necessary and actually made, and, inasmuch as the southerly limit of "Los Nogales de Elias" depends upon the northerly limit of the "Casita," my examination reaches back to the measurements of Casita in 1742 and 1841. The Casita ranch lies wholly in the Mexican State of Sonora, and that of the Nogales de Elias partly in Sonora and partly in Arizona. At the time of the proceedings in this case what was known as the central system prevailed. The States of the Republic were called "departments," but notwithstanding the change in the form of government, the method of disposing of the public lands remained substantially the same as before.

Laws Resulting from the Change of Government.

It is regarded as somewhat important to refer to laws effecting a change in the administration of the Treasury Department, under

which the disposition of the lands continued to be made, although its fundamental basis was not published until December 29, 1836.

48 Centralization was established by the law of October 3, 1835.

On its publication the Treasury Department issued a circular to regulate the closing of the treasury offices of the States, now converted into departments, and to make them dependent upon the central government, through the governors of the departments. This law of September 20, 1836, authorized the executive to dictate all measures that might be considered necessary for the regulation of the treasury system of the Republic until the organic law in relation thereto should be published without giving any power to impose new contributions or to increase those already imposed.

Under this authority, April 17th, 1837, the executive issued the decree centralizing the Treasury Department. This decree consolidated into one mass all the revenues, whether in their origin they pertained to the central government or to the departments. The administration of the public property was divided into two branches—collection and distribution.

Two special officers were established for their management, the first having in charge the administration of the revenue and the second that of the departmental treasury. The administration of the revenues was divided into principal and subordinate.

In every department there was a superior chief of hacienda, to whom the administration of the revenues and the departmental treasury was subordinate. In every department a treasury board was established for the management of the Treasury Department; which board was composed of the superior chief of hacienda, the departmental treasurer, the principal administrator of the revenues, and the comptroller, who also acted as secretary.

49 By law of December 16, 1841, the office of superior chief of hacienda was abolished and its functions were transferred to the departmental treasurer and the commandant general.

The central system was but of short duration. During its continuance the changes in the revenue administration did not affect the system of disposing of the public lands in Sonora. It simply involved a change of officers, without any material change in the law and proceedings.

The State of Sonora under the act of the Mexican congress of August 4th, 1824, still claimed the public lands within her limits and still continued to dispose of them under the provisional law of 1825 and the organic law of 1834, both of which had been passed by the State legislature to regulate the disposition of the public lands granted to the State by law of the Republic of August 4, 1824.

What the Sonora Archives Show in This Case.

The Sonora archives show that October 11, 1854, José Elias, one of the heirs of the original grantee of the rancho of Casita, made a petition to the treasurer general for an order for the remeasurement

of the Casita rancho, to the end that if there should be found demasias (surplus land) within the boundaries as anciently surveyed it might be adjudicated to him, and also asked that the valdios (vacant land) lying between the boundary of the rancho of Casita and that of the rancho of Las Calabasas and mission of Tumacacori be also adjudicated to him. In accordance with the said petition Francisco Navamuel was commissioned to take the necessary proceedings for the remeasurement of Casita and also for the measurement of the vacant land lying between that of Casita and Los Calabasas and the Tumacacori mission. Separate expedientes were formed of these two proceedings and transmitted to the superior junta of hacienda.

50 The one in relation to the valdios (vacant land) was concluded and the land sold to him on the seventh day of January, 1843. He therefore asked for a testimonio or certified copy of the original title papers.

October 12, 1854, the said José Elias made another representation to the treasurer general, setting out that the expediente of the remeasurement of the Casita rancho was approved in all its parts in 1842, and that in relation to the expediente of the valdios (vacant land), showing that the same was sold to the highest bidder on the seventh of January, 1843. Unfortunately the proceedings referred to did not exist in the treasurer's office, since the book in which they were written and signed, as well as all the archives of the "gefetura de hacienda," which office existed in the first epoch of the central government, were carried to the City of Mexico in 1852 by the commissioner appointed for that purpose; that the original expediente must exist in the archives; that the land is within the territory of the United States, and that he desired the necessary proof to show the legality of said titles. On this petition the treasurer general decided that a certificate be given to the effect that there existed in the archives an expediente of remeasurement of the rancho of Casita, a copy of which expediente was given to the interested party, but no copy was given of the approval by the superior junta de haciendo of valdios (vacant land), because the book in which the proceedings were recorded was taken to the City of Mexico, together with the archives that were formed in this capital by the extinguished gefetura de hacienda.

The documents from which the foregoing is extracted are annexed to the proceedings of the remeasurement of the rancho of the Casita made in 1841.

51 *Location & Area of the Nogales de Elias.*

The location of this grant is dependent upon that of the ancient grant of Casita; therefore, to determine it, it will be necessary to first ascertain the northern boundary of said Casita so as to get the correct starting point for the survey of the vacant lands petitioned for. The northern boundary of the Casita, which is wholly in Sonora, is the southern boundary of the grant under consideration. The petition asked for certain vacant lands between the limits of

two well-known grants or ranchos, and not for a certain quantity, but the survey which followed the petition fixed the quantity at exactly seven and one-half square leagues and two short caballerias. After survey every act in the proceedings up to and including the formal execution of the grant was upon the basis of the exact quantity ascertained by survey.

To show what importance the Mexican authorities attached to the quantity or area of grants of land, it is only necessary to refer to the action of the promotor fiscal (attorney general) in his review of the proceedings of valuation by the appraisers. All the land petitioned for was found by the appraisers to be desert or without water; therefore, under the law, the valuation was at the rate of fifteen dollars for each square league, the aggregate being stated by these officials to be $112.50. This valuation was acquiesced in through all subsequent proceedings until the case reached the promotor fiscal, who noted and corrected the omission to value the two short caballerias, and reported the true valuation to the treasurer general to be $113.12½ cents and ten grains, and this slightly augmented sum was exacted in payment, and the grant was executed for the definite quantity heretofore stated. The petition for the grant unmistakably shows that the petitioner wanted the vacant land bounded on the south by the Casita and northerly
52 by the Calabasas, without special reference to other boundaries; hence justice to the present petitioners and due protection of public rights require that this ranch or claim shall bound said ranchos as stated, with the easterly and westerly line so established as to include exactly seven and one-half square leagues and two caballerias.

Validity of Title.

The validity of the title to this claim is beyond a question. It is properly recorded in the proper book in the Mexican State of Sonora. The record is as follows, and is signed by the treasurer general, viz: "On the same day, the seventh day of January, 1843, a grant was issued for seven and one-half square leagues and two caballerias of land for stock-raising, embracing the vacant lands lying between the northern boundary of the rancho of La Casita and the western boundaries of the mission of Tumacacori and Calabasas, in the Primeria Alta, district of San Ignacio, in favor of Don José Elias and of his parents, Francisco Gonzales and Balvanera Redondo, citizens of the pueblo of Imuris."

The absence of the expediente from the archives is fully accounted or in the proceedings heretofore recited.

There is amply archive and record evidence of the genuineness of this grant.

Mineral Character of the Land.

The land contains minerals of gold, silver, copper, and iron.

One of the witnesses to this fact is part owner of the grant and the other is developing mines upon it. Both have proven the land

to be mineral by their work. It is nevertheless covered with nutri-
tious grass, and is therefore valuable for stock-raising, the
53 object the original petitioners had in view when they pur-
chased the land.

Deraignment of Title and Recommendation in the Case.

The deraignment of title to an undivided half of this claim or rancho is shown by conveyances and judicial proceedings of which there are complete copies in the transcript of this case. By them it appears that the "Camou Brothers," a noted firm of business men in Sonora, are owners of one undivided half of the claim of "Los Nogales de Elias;" claimants to the other half have made an attempt to deraign title, and at least one of them prefers confirmation of it to the legal representatives of the original grantees.

Therefore my recommendation is that an undivided half of so much of said private land claim as shall be found to be within the Territory of Arizona, by survey, as hereinbefore indicated, be confirmed to "Camou Brothers," and the other undivided half of a like portion of said claim be confirmed to "the legal representatives of the original grantees," with a reservation of the minerals therein to the government, accompanied by a declaration that the land is open to individuals for the exploration of mines and minerals, and have the benefit of all found under no more onerous conditions than those imposed by the Mexican government at the date of the Gadsden treaty.

September 25, 1853.

JOHN WASSON,
U. S. Surveyor General.

Tucson, Arizona, February 25, 1881.

54 OFFICE OF SURVEYOR GENERAL,
TUCSON, ARIZONA, *March* 23, 1892.

I hereby certify that the paper attached hereto is a correct copy of the paper it purports to be a transcript of on file in this office.

ROYAL A. JOHNSON,
[SEAL.] *U. S. Surveyor General, District of Arizona.*

(Endorsed:) Filed February 23, 1893. James H. Reeder, clerk, by R. L. Long, dep. clerk.

And be it further remembered that thereafter, to wit, on the 15th day of December, A. D. 1893, there was filed with the clerk of this court an amended answer; which answer is in the words and figures following:

55 UNITED STATES OF AMERICA, } ss:
District of Arizona, }

In the United States Court of Private Land Claims.

UNITED STATES OF AMERICA, Plaintiff, *vs.* SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, *et al.*, Defendants.	No. 29. Los Nogales de Elias Private Land Claim.

Amended Answer.

Comes now Santiago Ainsa, administrator, with the will annexed, of Frank Ely, deceased, and, by leave of court first had and obtained, files this his amended answer, and, in addition to the allegations already set forth in his answer on file herein, alleges as follows:

That as such administrator he is the owner in fee, holder, and possessor of an undivided one-third interest in and to that certain tract of land lying, being, and situate partly in the State of Sonora, Republic of Mexico, and partly in the soutnern part of the county of Pima, Territory of Arizona, commonly known as the Los Nogales de Elias private land claim or grant, and more particularly hereinafter described.

That defendant owns in fee, holds, and possess- such lands under and by virtue of a certain instrument in writing, now and hereafter designated as and being a grant title, bearing date the 7th day of January, 1843, made and executed by Captain Ygnacio Lopez, the treasurer general of the department of Sonora, in the name of the Mexican nation, under and by virtue of article 11 of the general sovereign decree of the Mexican Republic of August 10, 1824, donating to the States the revenues which in said law were not reserved to itself by the Mexican government, among which one of them is that arising from the lands in their respective limits
56 which belong to them; in consequence whereof and for the disposition of them the honorable constituting congress of the State, that used to be united, of Sonora and Sinaloa, promulgated the law, number 30, of the 20th of May, 1825, as well as subsequent legislatures passed other decrees on the same subject, which have been compiled in sections 3, 4, 5, 6, and 7 of chapter 9 of the organic law of the treasury department of Sonora, number 26, of July 11, 1834, and also the provisions of article 1 of the decree of April 17, 1837; of April 28, 1839; of December 24, 1840; and also the supreme order of the 21st day of the same month and year.

That under and by virtue of such laws and decrees such proceedings were thereunder lawfully and regularly had as that the said treasurer general of the department of Sonora, in the name of the Mexican nation, and as that the said department of Sonora, by its officers, duly authorized by the laws aforesaid and the other laws governing their said action, duly and regularly and for a good and valuable consideration, to wit, the sum of one hundred and thirteen dollars and fifteen and one-half cents, and for other good and valu-

able considerations in said grant title set forth and described, did, on said 7th day of January, 1843, sell and convey in fee to Don Jose Elias and his parents, Don Francisco Gonzales and Dona Balvenero Redondo, the land hereinbefore mentioned and more particularly hereinafter described, commonly known as and called the Los Nogales de Elias private land claim, or the grant of the public lands lying and being found between the northern boundary of the ranch of La Casita and the western boundary of the mission of Tumacacori and Calabasas.

That the said private land claim or grant was instituted by a petition of said Don Jose Elias, praying, on behalf of himself and parents, for a survey of the remnants of the public lands lying and being found between the northern boundary of the ranch of La Casita and the western boundary of the Tumacacori and Calabasas grant, and that proceedings of survey, valuation, and publi-
57 cation were taken on this petition, as required by law and as set out in the said title papers, and on January 7, 1843, the tract, as surveyed, according to the said title papers, and the whole of said tract, according to the natural landmarks and boundaries set out in said proceedings of survey, was sold to Don Jose Elias and his aforesaid parents for the sum of one hundred and thirteen dollars and fifteen and a half cents, which amount was thereupon paid by said grantees, and that thereupon, on said 7th day of January, 1843, there was issued to the grantees the testimonio or titulo of said grant, and the said grant was thereupon, on said last-named date, duly recorded in the archives of Mexico, to wit, on page 64 of the proper book in the said departmental treasury, being the book of records of land titles known as the book of Toma de Razon, and defendant alleges that the said grant is now duly recorded therein.

Defendant further alleges that the said testimonio or titulo is the same one heretofore filed in this court on February 21, 1893, and offered in evidence on the part of defendants on the trial of this cause.

Defendant further avers that the map and field-notes of one F. W. Oury, now deceased, which were offered in evidence in this case according to the stipulation on file therein with respect thereto, correctly represent the lands embraced within the said grant and the boundaries thereof, and defendant avers that his claim is to an undivided one-third interest therein in fee of said lands as designated by said map and field-notes.

Defendant further avers that such proceedings relative to this grant were had before the United States surveyor general for the Territory of Arizona as are set out in the answers of his codefendants herein in respect thereto, and to avoid repetition this defendant hereby adopts such allegations and makes the same part of this answer; that the deraignment of title of defendant is according to the certificate and deeds thereof filed by him in this cause.

58 Defendant further alleges that the original grantees of said grant were Mexicans and citizens of the Republic of Mexico, and that at the time of the Gadsden treaty the owners of said grant were likewise Mexicans and citizens of the Republic of Mexico.

Defendant further alleges that all of the steps and proceedings in the matter of the said grant and the sale of same were regular, complete, and lawful; that the said grant was not a grant by quantity, but was a sale by the metes and bounds and natural landmarks established by the survey thereof made by the Mexican officials prior to the issuance of same, and that it vested in the grantees a perfect and valid title in fee to the whole of said tract so surveyed, and that said grantees at the time went into the actual possession, use, and occupation of said grant and erected the proper monuments thereon, and that said grantees and their descendants and legal representatives had continued ever since and until the present time in the actual possession, use, and occupation of the said tract of land, and are now seized and possessed in fee thereof and of the whole thereof; that said grant documents constitute a complete and definitive grant in fee by way of sale with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject the tract to adjudication to third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed, and that defendant is entitled to a confirmation of said grant according to his interest therein in accordance with the original survey and grant of the same.

Wherefore defendant prays that the validity of his said title may be inquired into and decided and be declared valid to all of said lands within the Territory of Arizona, and for such other and further relief as to the court may seem meet and proper in the premises.

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Defendant Ainsa, Adm'r.

59 And be it remembered that on the 13th day of November, A. D. 1893, at Santa Fé, New Mexico, the court made the following order, to wit:

In the Court of Private Land Claims, Santa Fé District.

THE UNITED STATES
vs.
SANTIAGO AINSA, JUAN PIERRE CAMOU, *et al.*

Los Nogales de Elias.

Order.

On motion of Matt. G. Reynolds, Esq., attorney for the United States, due and proper notice thereof (in open court) shown to have been given to all the defendants' counsel herein, and the acknowledgement and waiver thereof by Juan P. Camou, by counsel, and the acknowledgement thereof and protest of Santiago Ainsa, by counsel, being submitted and George Hill Howard and William E. Earle, counsel for certain defendants in said cause, appearing in person, all being duly heard thereon, and after due consideration being given thereto—

It is ordered that the defendants in the above cause file with the clerk of this court on or before November 27, 1893, for the inspection of the attorney of the United States all grant papers, evidences of title, and documents of whatever kind and nature which said defendants expect to offer in evidence in the above-entitled cause, with copies and translations of the same; also that said de-
60 fendants file with the clerk of this court on or before said date, to wit, November 27, 1893, for the purpose aforesaid, all original papers in their possession or under their control purporting to evidence a grant by the Mexican nation, the State of Sonora, of the Republic of Mexico, to the property described in the bill of complaint herein or any part thereof, with translations and copies of the same; also that said defendants file with the clerk of this court on or before said date, to wit, November 27, 1893, for the purpose aforesaid, a duly authenticated transcript of all records and documents, the original of which are not under the control of said defendants, purporting to evidence a grant by the Mexican nation, the State of Sonora, or the Mexican Republic to the land described in plaintiff's bill of complaint herein or any part thereof which you expect to introduce in evidence; also that said defendants file with the clerk of this court on or before November 27, 1893, for the purpose aforesaid, all original deeds, with copies and translations thereof, and mesne conveyances, with copies and translations thereof, by which they and each of them claim title through and under the original grantee to the said Los Nogales de Elias grant.

It is further ordered that the clerk of this court transmit by mail a duly certified copy of this order to William Herring, Esq., Rochester Ford, Esq., and George Hill Howard, Esq., attorneys for defendants in this cause.

61 And be it further remembered that on the twelfth day of December, A. D. 1893, the same being the second day of the December term of this court, held at Tucson, Arizona Territory, the following proceedings were had, to wit:

THE UNITED STATES, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, etc., *et als.*, Defendants. } No. 29.

This cause came on regularly for trial, Matt. G. Reynolds, Esq., attorney for the United States, and L. F. Parker, Esq., of counsel, appearing for the plaintiff, and Rochester Ford, Selim M. Franklin, and George Hill Howard, Esquires, appearing for the defendants.

The court made the following order:

To Levi B. Manning, U. S. surveyor general of Arizona:

You are hereby commanded and directed to deliver unto the clerk of this court, taking his receipt therefor, all the papers on file in your office relating or appertaining to a claim against the United States, on file therein, commonly known and designated as Los Nogales de Elias grant.

The following order by consent of counsel was made: It is ordered that B. W. Tichenor be, and he hereby is, appointed official stenographer of this court to report this case, and the parties hereto stipulate that the notes of the trial made by said stenographer, when written out in long-hand and filed with the clerk, shall constitute the record of the testimony given on the trial.

Upon the trial of this cause on said last above named day, to wit, December twelfth, 1893, the following testimony, oral and documentary, as reported by said stenographer, was offered and introduced:

62 United States Court of Private Land Claims, Tucson, Arizona.

UNITED STATES OF AMERICA
vs.
SANTIAGO AINSA, Administrator, &c., *et al.* } No. 29.

Transcript of short-hand report of proceedings had upon the trial of the above-entitled cause, at Tucson, Arizona, on Tuesday, the twelfth day of December, A. D. 1893, at 10 o'clock a. m., before the said court sitting in banc (Justice Stone being the only absentee) and in the presence of Matt. G. Reynolds, Esq., attorney for the Government, and L. F. Parker, Esq., of counsel, and of Rochester Ford, Esq., S. M. Franklin, Esq., Geo. Hill Howard, Esq., and Santiago Ainsa, Esq., attorneys and of counsel for the various claimants who are defendants herein.

The various attorneys announced ready for trial and were by the court directed to proceed.

By Mr. REYNOLDS: This suit was instituted on the part of the United States by the claimants for what is known as the "Los Nogales de Elias private land claim," alleged to be situated on
63 the south line of the United States and covering the town of Nogales. The petition was filed out of abundant precaution with the view of raising every question under the peculiar wording of the act that were possible to be raised, and I will state that so far as the Government is concerned a number of them will be abandoned. The petition gives a full history of the status of the claim, and I will therefore read it if the court please.

By the COURT: You may read the petition.

Mr. Reynolds thereupon read the petition filed by the United States herein.

By Mr. HOWARD: When the United States instituted proceedings in the matter of this claim I was preparing a petition on behalf of Juan Pedro Camou and myself as claimants of this grant, and after the suit was brought I filed a petition which, as I understood at that time, took the place of the one filed by the Government and became the petition in the case of Camou and myself. I will read the petition as it is to the court.

Mr. Howard then read the petition of Juan Pedro Camou and George Hill Howard filed herein.

By Mr. FORD: May it please the court, there was a further answer filed by Col. William Herring, representing Mr. Camou's
64 interests. In the absence of Mr. Herring, who, as the court knows, is too ill to be present, I will read it.

Mr. Ford then read the answer of Juan Pedro Camou to the petition of the Government filed herein.

By Mr. FORD (after reading answer): To this is annexed a copy of the report and recommendation of the surveyor general of this territory.

By Mr. PARKER: I shall object to the reading of the report on the ground that it is evidence and not pleading in this case.

By the COURT: You need not read it now. It will probably be put in evidence.

By Mr. FORD: Very well, your honors. There was a separate answer filed by Santiago Ainsa, administrator, with the will annexed, of Frank Ely, deceased, which I will read.

Mr. Ford then read said answer.

By Mr. PARKER: The court please, these pleadings are somewhat verbose and many things are set forth in them which will not come up in the case, and for that reason, and in order that the court may hear the testimony more intelligently than they could from a mere hearing of the pleadings, I will state briefly the questions the Government expects to raise in the case. They are substantially four.

65 The first one will be a question which has already been partially passed upon in this case, which is a question of pleading. It will be insisted on behalf of the Government that the answer of Mr. Ainsa in this case is wholly insufficient to support any claim; that when a defendant is brought into court it is his duty to quiet his title and set it up, and in so doing it will be insisted that he must set up all the jurisdictional facts, the same as in an original petition.

In the present status of the case it is not important, because Mr. Camou is here with a good answer which does set up all the jurisdictional facts, leaving the question as to who it belongs to to be hereafter adjudicated; but hereafter, in the course of this case, if it should be learned that the grant for any reason can be confirmed, then this question will become important whether the grant can be confirmed upon the answer of Mr. Ainsa, and the Government will then maintain that the answer alone is insufficient to authorize the confirmation of this grant.

The second proposition is that the grant must have been confirmed by the national government of Mexico, and that without such confirmation it was absolutely null and void.

The third proposition is that the grant was a grant by quantity—a grant of 7½ sitios. The evidence will show that as a matter
66 of fact within the outer boundaries of this grant there are more than 18 sitios, more than 12 sitios of which lie within the Mexican Republic. The original grant covering only 7½ sitios, the

position of the United States will be that whatever surplus lands there were in this grant, if any, passed to the United States by the cession of 1853.

Further upon that same point the answer of the defendant Camou recites that in 1882 he applied to the Mexican government for the purchase of demasias or surplus lands of this grant, and that the government of Mexico at that time found that within the Republic of Mexico there was something like nine sitios within the outer boundaries of this grant, and that Camou became the purchaser of this surplus land.

It was the practice in these Mexican grants within the States where they were made by sale and not by gratuitous grant for services or for other gratuity to sell a certain portion of land, seven and one-half sitios, and they were called sitios and not "land" throughout the grant within certain boundaries. These surveys were often inaccurate, and afterwards it was often ascertained that there was more land measured than was contained in the grant of the sitios, and this surplus land the grantee had the right of purchasing; what under our land laws would be the right of purchasing was accorded to the owner of the fee of the original grant.

This in Mexico was called demasias, or surplus land.

67 This particular grant was upon a petition to purchase the demasias in the Casita ranch and also the vacant land lying north of the Casita and west of the Calabasas ranchos.

In 1882, under the provision, Camou files his petition stating that there is more than the seven and one-half sitios in the grant and asks to exercise his right of purchase and does purchase in 1886 upon that petition the surplus land above the 7½ sitios lying in the Republic of Mexico. We shall insist that so far as Mr. Camou and any one holding under him is concerned that it is an absolute estoppel to his claiming any land in the United States, having admitted that he received all the land he purchased, 7½ sitios, and having petitioned for and purchased the surplus lands lying within the government of Mexico.

The fourth ground which the Government will take is that in 1853 there remained in the archives of Mexico no record of this title; that there was absolutely no record as required to be kept by the laws of the Republic of Mexico of this title. The records will show that in the Toma de Razon, in the State of Sonora, there was an entry of this sale sufficiently describing it so that it might be identified, I presume, by furnishing the exp-iente; that this entry was in a mere minute book and not the record required to be kept

68 by the national law. The national law will be produced and read to your honors which required that two books be kept; first, the board of sales was required to keep a record book, every entry in which had to be signed by the members of that board. That was the solemn record of that board, like the record of a court signed by the judge, only in this instance it was signed by every member of the board. We will show there was no record in any such book in 1853 of this grant.

Another record required by the national law to be kept was *that*

the original matrix, as it is called, not the grant, but a judgment-roll, as we would call it in our country, giving the petition, the action of the officers upon it, the survey, and reciting all along the acts of the different officers down to the grant itself, which remained in the archives. It is a record showing that the steps leading up to the grant had been regular and correctly taken. There was no such matrix or record or registry in the archives of Mexico in 1853; hence the Government will claim that its title is free from any claim or title in Mr. Camou or any other person in this grant.

By Mr. FORD: Will the court at this time hear a statement on the part of the defendants or will that properly come in at the introduction of their evidence?

By the COURT: The court understands sufficiently the
69 questions that are to be tried. You may proceed with the testimony.

By Mr. PARKER: We understand that the burden is upon the defendants in this case. Both sides admit that they claim the land under this grant.

Mr. Ford contended that under decisions of the Supreme Court of the United States that where the Government asserts a title the burden is upon them to prove it.

By the COURT: The question now is whether the grant shall be confirmed so far as the lands lying within the jurisdiction of this Government and of this court are concerned, and in this issue the burden is upon the parties who will have the benefit of the judgment of the court. The object of this proceeding by the Government is simply to bring the parties in here in order that the claimant should bring in his title and have it confirmed if it shall be found that their grant is valid. The defendants will therefore proceed as if they were the petitioners. In addition to that consideration both parties have prayed for a confirmation of this grant.

By Mr. FORD: I understood your honors to hold the answer in the Sonoyta case sufficient, which answer is substantially the same as the answer of Mr. Ainsa in this case. If the answer
70 is defective I shall ask leave to amend. The Government has made no point on it up to this time.

By the COURT: Certainly you may amend.

SANTIAGO AINSA, a witness called and sworn on behalf of the defendants, testified as follows:

Direct examination:

By Mr. FORD: It it admitted that a paper endorsed, "Original title paper Los Nogales de Elias. Filed in surveyor general's office June 6, 1880, at 9 a. m., by Pascal Camou. Recorded in Journal, volume 2, pages 388 to 434, inclusive," was filed in the office of the surveyor general for the Territory of Arizona the date it purports to have been filed, and was recorded as it purports to have been recorded, and that said document was afterwards withdrawn at the request of Pascal Camou, by whom it was filed.

By Mr. FORD:

Q. State your name and occupation.

A. Santiago Ainsa, attorney-at-law.

Q. What is your nationality?

A. I was born in Mexico. I am an American citizen now.

Q. What experience and observation, if any, have you had with regard to signatures existing in the office of the treasurer
71 general of the State of Sonora, at Hermosillo, Mexico—the various treasurers general of that State—prior to the time of the Gadsden treaty?

A. I have often examined records there in my business, and I know a good many signatures.

Q. State when you last examined the records, and to what extent and for what purpose.

A. Permit me to have my notes. (Referring to memoranda:) Last April, between the first and the tenth, I was in Sonora and examined all the records concerning land grants in Arizona as far as I could reach. I examined most of the grants.

Q. State whether or not in the documents there you saw what purports to be the signature of Juan Ygnacio Lopez, a treasurer general.

A. Yes, sir; I saw it in the statement with regard to this grant.

Q. Did you see it in the book of Toma de Razon, signed to various entries?

Objected to as to form.

Q. State whether or not you saw the signature, as near as you can recollect, in any of the documents and books.

A. I have here a statement of what I saw. You see I examined so many records that I took notes as I went along so as to be able to refer to it. This book I hold in my hand is notes taken from the records in Sonora at that time. I have a note here taken from a record in the State of Sonora, but I don't know whether
72 it is in the Toma de Razon; I haven't put that down here.

Q. State in what documents or in what books you saw the signature purporting to be that of Ygnacio Lopez, if you remember.

A. There is a copy of the expediente in existence there which has an annotation in it——(Interrupted.)

Objected to.

By Mr. FORD: No; I do not care for that; I simply wish to prove that he is familiar with the signature.

Q. State in a general way whether you saw the signature purporting to be that of Ygnacio Lopez to various documents there.

A. Yes, sir; I saw several.

Q. Did you see there what purports to be the signature of Juan Antonio Ferran y Peralta?

A. I forget that; I don't remember that.

Q. (Exhibiting document.) I will show you this document.

A. Oh, that is Terran.

Q. Do you remember whether you saw signatures in that office purporting to be the signature of this gentleman?

A. Yes, sir.

Q. Antonio Terran y Peralta?

A. Yes, sir.

Q. I now show you a document endorsed, "Original title papers Los Nogales de Elias," and ask you whose signatures, in your opinion, are attached to it.

A. The signature of Ygnacio Lopez is the genuine signature of that gentleman, according to the records on file there found
73 in a great many state papers, and that signature is genuine.

Q. What have you to say as to the signature of Antonio Terran y Peralta?

A. Well, it has the evidence of being genuine, but he wasn't a man of great importance, so I couldn't—the character of it is genuine, apparently, and so is the others, but I couldn't swear to these little secondary persons, but as to a man that occupied a place of eminence, like Lopez and Milla, those I am familiar with, but as for these witnesses I am not very familiar with them; I couldn't swear exactly they were the persons.

Q. What do you say as to the signature of Ygnacio Lopez?

A. That that is a genuine signature of the man. I have seen it many times in the archives there. Sometimes I could see even the scroll, and I know it by the scroll without the name. There is a fashion in Spain and Mexico of signing some documents simply with a scroll, according to the dignity of the document, some documents being signed with the full name and some only with the last name and others with a scroll alone.

Q. By "scroll" you mean rubric?

A. Yes, sir; this way (illustrating by making a scroll in the air), whatever you call it in English, that zigzag business.

By the COURT: We understand what that is.

By Mr. FORD: We offer this document in evidence on the proof adduced as to the signature, and for the further reason that
74 it is an ancient document, coming from the proper custody, filed according to the stipulation, and in the possession of the claimant.

By Mr. PARKER: We ask that the extent of this offer be at this time made known. There is appended to it a modern document, seeming to be a different paper, and we ask if the whole document is now offered, including the validation.

By Mr. FORD: I offer the document just as it is, word for word, and everything in it; I could not do otherwise.

Q. You state that you are familiar with the Spanish language?

A. Yes, sir.

Q. State whether the document which you now hold in your hand is a correct translation of the document which I before showed you.

A. I made it myself, and as far as I am able to judge I made it as good as I could.

Q. Is that translation correct, substantially correct?

A. It is.

By Mr. FORD: If the court please, we offer in evidence the translation of this instrument, not the handwritten copy, but two typewritten copies of it. I showed one of them to counsel on the other side yesterday, and it was agreed to be correct, substantially.

By Mr. REYNOLDS: We reserve the right to enter before
75 the case is closed any objection we may have to the introduction of the translation. I do not know as we have any objection, but we reserve that right.

By Mr. FORD: Certainly; the only object is to get a correct translation.

If the court please, we understand that this case rests right on these title papers, with very little further evidence that we purpose to introduce—simply the deraignment of title and evidence showing the location of the grant on the ground. The sum and substance of the claim of the defendant is in the title papers. There was nothing further done, as we understand it, of any legal effect but the proceedings which are enumerated in these title papers delivered to the grantee, and, while they are somewhat long, I do not believe the court can be apprized of it any better than at the present time, and, with your honors' permission, I will read this in evidence now, having already offered it.

By the COURT: We will take it and read it, Mr. Ford; it is not necessary to read it now.

By Mr. FORD: Very well, your honors.

Q. Do you know whether there is in the office of the treasurer general, at Hermosillo, Sonora, a book entitled "Libro de
76 Toma de Razon"?

By Mr. PARKER: That is objected to on the ground it is not the best evidence of which the subject is capable; that the certificate of some officer—the proper custodian of that book—is the only proper evidence. Parole evidence of a stranger as to what is there and coming up here and testifying to it is neither primary or secondary evidence nor evidence at all which is competent.

By the COURT: We will take it subject to the objection. We think the fact of the existence of this book may be proven by parole. We do not pass on the question of its contents; that is not raised. The objection at this time will be overruled.

A. Yes, sir; there is a book there called the Toma de Razon.

Q. Do you know whether this grant is recorded in that book?

Same objection.

By Mr. REYNOLDS: We have a further objection to this. It was not filed as record evidence under the rule already prescribed by this court on or before the 27th day of November, 1893.

By the COURT: We will not stop to examine the question now.

77 The proof may go in subject to the objection and we will make an express ruling on it when we have examined the question.

Q. State what, if anything, you found in the Toma de Razon regarding the grant embraced within the document which I showed you.

A. I found that title had been issued to Balvanera and Ygnacio Elias and Jesus Elias.

Q. Have you a copy of that entry?

A. You want the copy in my book?

By the COURT: Yes; the copy of the entry.

By the WITNESS: Do you wish me to translate it?

Q. I am not asking you about any statement, if there was any, as to the removal of the expediente, but I am asking you what you found in the book of Toma de Razon.

A. I haven't it down here in my memorandum book.

Q. I think you will find it there if you will look.

A. The Toma de Razon had a statement. (Interrupted.)

Q. No; I do not wish that, but I wish a copy of the entry you found in the book of Toma de Razon, if you have it.

A. I forget whether I made a copy of it or not, but I know what it had in it.

Q. If you haven't it there in your book we will prove it by another witness.

78 By Mr. REYNOLDS: We object to this manner of making the proof, because there is a certificate of the treasurer general as to the contents of that book and exactly what it recites, and I object to trusting to the uncertain memory of this witness as to matters which are certified to by the official having charge of the archive and of which we had notice

By the COURT: It is not calling for his memory, but for his memorandum copy made at the time; but it is now the noon hour and we will take a recess until half past one o'clock.

Recess from 12 m. until 1.30 p. m.

By the COURT: You may proceed.

Q. (The pending question was read to the witness.)

A. On page 64 and the reverse, continuing, the following entry is found (reading from memoranda): "En el mismo dia 7 de Enero, 1843, se espidio titulo de merced de siete medio sitios y dos caballerios escasas de tierra para cria de ganado mayor y caballeda comprendidos de los huecos valdios que sehallan situados entra los linderos del Norte del rancho de la Casita y los de Poniente de la mission de Tumacacori y Calabasas en la Pimeria Alta partido de San Ygnacio a' favor de D. Jose Elias y de sus padres D. Fran'co. Gonzales y D'a. Balvanera Redondo vecinos del pueblo de Imurez.

LOPEZ. [RUBRIC.]"

Q. From what do you say that was made and how?

A. That was copied from the bottom of page 64 of the
79 Toma de Razon, continuing on the reverse side of the page.

By Mr. FORD: We will offer the translation of that, if the court pleases. I will ask you, Mr. Ainsa, to furnish and file with the clerk today a translation of that entry which you have just read.

By the WITNESS: Very well.

By Mr. FORD: I now offer the entry read and the translation to be furnished the clerk later on.

By the COURT: Very well.

By Mr. FORD: That is all.

Cross-examination.

By Mr. PARKER:

Q. (Exhibiting a document.) This, I believe, is a copy of your translation of the expediente?

A. Yes, sir.

Q. (Referring to translation.) This is "first auction" there.

A. Yes, sir.

Q. Will you turn to the original grant and show me the Spanish?

A. (Witness did so.) It is "primera pregon."

Q. What word did you translate—"auction"?

A. I translated "pregon."

Q. Is that a correct translation?

A. Well, not exactly.

Q. Give us the correct one.

A. You may say "the first offering."

Q. Is "offering" the correct translation?

80 A. I think so—that is to say, it is an offering, and it is a proposition according to law.

Q. Well, we don't want anything about "according to law." We will see about that afterwards. Tell us what the correct translation is. Is it not "proclamation"?

A. Yes, sir; first offering——(Interrupted.)

Q. Yes.

A. Or notice of offering. That is what it means.

Q. That is a correct translation?

A. "First public offering."

Q. Now go over to the word after the opinion of the attorney general for the treasury department. Then there are three offers there on page 25 of the translation?

A. Offerings at the capital at Arispe?

Q. Yes, sir; at the capital. Turn through and see what Spanish word is used there. It follows immediately after the opinion of the attorney general of the treasury department.

A. What date was that?

Q. On the 5th day of January, 1843.

A. "Primera almoneda."

Q. Does that mean the same thing? You have translated that as first—"first auction" also?

A. Yes, sir.

Q. Does "almoneda" mean the same as "pregon"?
A. It means effectually the same.
Q. Virtually the same?
A. Yes, sir.
Q. Now go to the opinion of the attorney general for the interior department, on the page prior to that, and tell me the Spanish words you have there for "contained between."
81 A. In the opinion?
Q. Yes, sir.
A. "Comprendidos."
Q. "Comprendidos de los?"
A. No; "entre los."
Q. That is, "comprehended within," is it not?
A. No; "entre" is between.
Q. That is correctly translated, is it?
A. I think so.
Q. Now, on the next page, the recital in the first auction, you have here "situated between." Give me the Spanish word you have for that.
A. "Comprendidos"—that is, comprised.
Q. What is the next word?
A. "De la huecos."
Q. You have it here, "situated between"?
A. The word there, "comprendidos," means contained in.
Q. Contained in?
A. Yes, sir.
Q. That is a correct translation of that expression?
A. Yes, sir; it means the amount contained in that measurement.
Q. That is all.
A. Now, I want to explain how the word pregon and almoneda means the same thing effectually, if the court will allow me?
By the COURT: Yes; you may explain, if you wish.
By the WITNESS: The law with regard to the sale of lands was this: It had to be offered thirty days at the place nearest to where the land was, first; if anybody then and there offered a cer-
82 tain sum of money that was considered as being offered, and he was entitled to a sale for that amount in the last three auctions that took place at the capital; if anybody offered any other amount that was considered as being offered, and in the last three sales each day the thing was offered, and in the last offer somebody had to give over and above any previous offer; otherwise this person had a right to it; so that word pregon amounts to the same thing. I will explain also besides, in reading this document, the persons that were commissioned to make the different proceedings were not intellectual persons, and (interrupted)——

Objected to at this time as a discussion of the law.

By the WITNESS: No; but they were not literary persons, and they used to use one word for another, and I can show you titles where "pregon" is used in one place and another place where it is stated almoneda.

Q. All we want to get at is what literate persons translated it, and not illiterate persons.

A. Well, it means public offering.

Q. Now, go to the first auction again and to the last line except one, the word "publication," and see what the Spanish word is for that?

A. "Primera pregon."

Q. I see you have translated that "publication" where it occurred in one place "auction" and in another "proclamation"?

A. Both mean the same thing.

83 Q. As a matter of fact don't they mean the first notice or the first publication? Is not that what the word "pregon" means?

A. As a matter of fact it is first public offering. You must take the word with the context. You must take it all together.

Q. There is just two words there, and I want to know what they mean correctly translated.

A. Pregon means the public offering under that law.

Q. Now, leave the law out. Don't they mean "first publication," literally translated?

A. No, sir. Literally translated it means the offering by a crier at an auction; that is what pregon means.

Q. What does almoneda mean, then?

A. It means the selling. Almoneda contains the pregon in it, because it is issued out by the crier that says, "Now come and bid on this property."

By Mr. PARKER: That is all.

Redirect examination:

Q. Will you translate the whole sentence about which Mr. Parker asked you in the second question?

A. What part is that?

By Mr. PARKER: In the latter part of the opinion of the attorney general.

By the WITNESS: "Comprised between."

Q. Please translate the whole sentence.

A. "That there are to be celebrated or executed by the treasurer the three public auctions or offerings of the said seven sitios

84 and one-half and two caballerios of land—of public land—for raising cattle and horses comprised or existing between the boundaries to the north of the Rancho La Casita and those on the west of the mission of Tumacacori and Calabasas."

Q. Translate the whole sentence that was asked about the second time.

A. (Referring to original expediente.) "Victor Escalante in a clear and loud voice said: 'There is going to be sold at auction, on account of the public treasury department, seven and one-half sitios and two short caballerios of land for the raising of cattle and horses, contained—comprised—in the huecos valdios between the boundaries of La Casita and the mission of Tumacacori.'" I would

translate that word "contained;" "comprendidod" there has that signification.

Q. Now, further on, about one page, "On such terms as this sale"—translate that.

A. "In such terms this act of sale was concluded, being publicly and solemnly sold at auction the seven and one-half sitios and two short caballerios of land for the raising of cattle and horses that comprised in the huecos y valdios, situated between the boundaries of La Casita and those of the mission of Tumacacori and Calabasas."

By Mr. PARKER:

Q. I want you to give me the word there that you translate "that."

A. "Que."

Q. What is that word there that you now translate "comprise"?

85 A. "Comprendidos;" that is the same word, but a different tense.

Q. What is it there?

A. Do you want me to parse it?

Q. No; what is the word in Spanish?

A. "Que comprenden."

Q. What tense is that?

A. The present; third person.

Q. That is enough. It is not past participle, is it? What is the past participle?

A. It is third person, plural, present tense, indicative mood.

Q. "Comprising" is not a correct translation of that, is it?

A. Well, "contained" would be.

Q. "Contained" would be better?

A. I think so.

By Mr. FORD:

Q. Just indicate the Spanish there that you have translated, beginning at the word "que," so we will know what this inquiry is about.

A. "Que comprenden huecos y valdios."

By Mr. FORD: That is all.

BRYAN WARD TICHENOR, being duly sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. FORD:

Q. State your name, age, and occupation.

A. My name is Bryan Ward Tichenor; age, 32; by occupation, attorney and counselor at law and stenographic court reporter.

Q. Have you had any experience in the matter of the ex-
86 amination of papers in the office of the surveyor general of the United States for this Territory, in this city, and in the office of the treasurer general of the State of Sonora, Mexico, at Hermosillo, Sonora, purporting to be title papers of grants of land in this Territory? If so, state what you have done in regard to that.

A. At various times I have had occasion to examine documents of that character in the office of the surveyor general for Arizona, in this city, and on one occasion I visited the city of Hermosillo, Sonora, and there in the office of the treasurer general examined the archives and the titles there affecting lands in the Territory of Arizona granted by the State of Sonora. The latter examination was made in the early part of April of the present year, 1893.

Q. What examination, if any, did you make of certain signatures purporting to be the signatures of Ygnacio Lopez in any books or upon any documents?

A. I made a careful examination of several signatures of Ygnacio Lopez, among others, upon various documents, and made some tracings of his signature and other signatures for the purpose of testifying to their genuineness.

Q. Have you any tracings now of that signature?

A. Yes, sir; I have in my hand now my notes of the examination made at that time, among them the tracing of the signature of Lopez taken from the entry in the book of Toma de Razon of this Los Nogales de Elias grant.

87 Q. I show you the original title papers of the Nogales de Elias private land claim purporting to be signed by Ygnacio Lopez: I will ask you to say what is your opinion as to that signature.

A. I will say that the tracing that I have before me enables me to say that I have no doubt whatever of the genuineness of the signature of Lopez, with the rubric attached, upon these title papers.

Mr. Parker at this point stated that the Government would raise no point as to the genuineness of the signature in question.

Q. Do you know whether there is in the office of the treasurer general a book called "Toma de Razon"?

A. I know there is such a book. I examined it very carefully. It is entitled "Libro de Toma de Razon."

Q. Do you know whether there is in that book an entry regarding the grant, the title papers of which I have shown you?

A. I have here in my notes a copy of an entry found in the book "Toma de Razon," which I presume is the entry to which you refer. I am not a Spanish scholar and am unable to testify as to anything in that language. I can say, however, that the entry does refer and relate to that grant. I know enough Spanish to answer that.

Q. When was that memorandum made by you and under
88 what circumstances?

A. The memorandum was made by me on one of the early days of April—I think the 6th. I can be accurate as to the date, if

necessary. It was made in the office of the treasurer general, at Hermosillo, Sonora, Mexico, in the presence of Bartolomio Rochin, the archievaro of that office, and is an exact copy of the entry in the book of Toma de Razon on page 64 and the reverse side thereof, letter for letter, in Spanish.

Q. Do you testify that this is a verbatim and literal copy from the book of Toma de Razon?

A. It is.

By Mr. FORD: We offer this memorandum in evidence with a translation of it.

By Mr. PARKER: We make the same objection which was made this morning.

By the WITNESS: I have a typewritten copy of the entry. I will read it or hand the copy to the clerk.

The entry is as follows (reading): "En el mismo dia 7 de Enero, 1843, se espidio titulo de merced de siete medio sitios de dos caballerios es casas de tierra para cria de gando mayor y caballeda comprendidos de los huecos valdios que se hallan situados entre los linderos del norte del rancho de la Casita y los del poniente de la mission de Tumacacori y Calabasas en la Pimeria Alata partido
89 de San Ygnacio a favor de D. Jose Elias y de sus padres D. Fran'co Gonzales y D'a Balvanera Redondo vicinos del pueblo de Imurez."

"LOPEZ. [RUBRIC]."

By Mr. FORD: If the court please, we have another witness to prove the same fact. It will be cumulative, and we think it unnecessary. That is all, Mr. Tichenor.

By Mr. REYNOLDS: No cross-examination.

By Mr. FORD: If the court please, we offer in evidence a paper endorsed "Statement of title of Santiago Ainsa, administrator, to the Nogales de Elias land grant, filed Feb. 21, 1893," with the deeds which accompany it.

By the COURT: Let it go in.

(The following is a true copy of said statement of title:)

Statement of Title of Santiago Ainsa, Administrator and Trustee, to an ⅓ Interest in the Nogales de Elias Land Grant.

1. State of Sonora to Francisco Elias Gonzales and Balvenera Redondo, his wife, and Jose Elias Gonzales, their son.

2. Francisco and Balvenera Gonzales had two children, to wit, a son, Jose Elias Gonzales, who, with his parents, was one of the original grantees named in the Nogales de Elias grant, and a daughter, Guadelupe Elias Gonzales, under whom Santiago Ainsa, as administrator and trustee, claims a one-third interest in said grant.

3. Guadalupe Elias Gonzales married one Jose Juan Perez, by whom she had a daughter by the name of Dolores. Both Guadelupe and her husband, Jose Juan Perez, died many years ago.

90 4. Dolores Perez was married to Jose Maria Redondo. This Dolores conveyed all her interest in the county of Pima, Territory of Arizona, in the aforesaid grant to J. P. Solomon, of the city of New York, and he conveyed all his interest unto Frank Ely in his lifetime, dated December 7, 1887.

5. Dolores Perez Redondo inherited all the interest in said grant which her mother, Guadalupe E. G. de Perez, had. This Guadalupe inherited from her father and mother an undivided one-half interest, and, as their interest was an undivided two-thirds of the whole grant, Guadalupe inherited an undivided one-third of the whole.

6. Santiago Ainsa, as administrator and trustee, represents the one-third interest so conveyed to Frank Ely in his lifetime.

7. Evidence of the relationship of Dolores Perez to the said original grantees is contained in the deposition of Margarita Ronstadt on file in the district court of the first judical district of the Territory of Arizona in and for the county of Pima in the case of Ainsa *vs.* Camou *et al.*, No. —.

91 GEORGE J. ROSKRUGE, a witness called and sworn on behalf of said defendants, testified as follows:

Direct examination.

By Mr. HOWARD:

Q. State your name and official capacity.

A. My name is George J. Roskruge; I am chief clerk in the office of the United States surveyor general for the district of Arizona.

Q. What are those papers which you have in your hand?

A. Papers on file in the office of the surveyor general relating to the Rancho Los Nogales de Elias land grant.

Q. All of the papers on file in that case in that office?

A. Yes, sir.

By Mr. HOWARD: We will introduce a portion of them:

First. Certified copy of a deed from José Elias to Tomas Robinson, in Mexico.

(The said document was admitted in evidence, subject to any objection which the United States might assign.)

Deed from Juan A. Robinson to Camou Brothers, certified copy. (Admitted as before.)

Certified copy of correspondence between Juan A. and Tomas Robinson and judicial proceedings.

By Mr. REYNOLDS: We object to any private correspondence.

By Mr. HOWARD: We offer it as part of the judicial pro-
92 ceedings, with translation of it.

By Mr. PARKER: The objection is made to it at this time in order that the court may be notified. It appears to be an adjudication in favor of Camou against John Robinson by a court or notary public acting as a court in the Republic of Mexico in 1873 and 1874, after the treaty. We make the objection — whatever

judicial proceedings may have been had at that time had no force and could convey no title to Camou or any other person.

By Mr. HOWARD: I offer a number of exhibits—copies of files and of transfers, and so forth, to George Hill Howard, to show present interest in Mr. Howard. I will furnish the stenographer a description of them for the record.

(NOTE.—A list of documents such as above referred to was furnished and filed with the clerk.—REP'R.)

By Mr. PARKER: The objection will be still made that no title has been shown in Camou.

By Mr. FORD: We offer the stipulation signed on behalf of the Government and the defendants as to the survey of this grant made by Mr. F. W. Oury, now deceased. (Reading:) "It is hereby stipulated by and between the United States of America and Santiago Ainsa, one of the defendants herein, that a survey of the
93 private land claim partly in Pima county, Arizona Territory, and partly in the State of Sonora, Republic of Mexico, commonly known as and called the 'Los Nogales de Elias' private land claim or grant, was made for use in this court in the trial of the above-entitled cause by one Frank Oury; that said Oury is now dead, having departed this life on or about the 19th day of September, A. D. 1893; that said Oury was a surveyor and was acquainted with the Spanish language; and it is further stipulated that said Oury, if alive, would testify on the part of the defendant- herein as to such facts as would prove him to be an experienced and skillful surveyor, and would further testify that during the month of December, 1891, he made a survey of the said Los Nogales de Elias private land claim according to the survey, natural objects, and other descriptions of the original survey thereof made by the Mexican authorities prior to the issuance of said grant as contained in the original title papers thereof, and that said Oury, if alive, would testify that from such survey he made a careful and accurate computation of the total area of the land within the boundaries of said grant and of the area of said grant within the United States of America, and that
94 the result thereof is correctly stated in the margin of said map.

"And it is further stipulated that the paper hereto attached, marked 'Exhibit B,' being the field-notes of the said survey of the Los Nogales de Elias private land claim made by said Oury, are the original field-notes of said Oury, and that they may be read in evidence with the same force and effect as though said Oury were alive and testified as to the same, it being stipulated that said Oury, if alive, would testify to the same facts as are embraced within the said field-notes so signed by him.

"And it is further stipulated that this stipulation may be used by and on behalf of all the defendants in the above-entitled cause, being taken as and for the testimony which said Oury would give if alive."

The following is a copy of the field-notes of F. W. Oury referred to in the foregoing stipulation:

Field-notes of the Survey of the "Los Nogales de Elias" Private Land Claim, Situated in Pima County, Arizona Territory, and Sonora, Mexico, Surveyed by F. W. Oury.

Field-notes of the survey of the Los Nogales de Elias private land claim.

95 The "expediente" of the "Rancho Los Nogales de Elias," in accordance with which the survey was made, describes the initial point of "South Cruz" monument of this "rancho" as being the "North Cruz" monument of the "Rancho de la Casita."

I therefore begin at the point heretofore established by a survey of the "Rancho de la Casita" as the North Cruz monument of that ranch and commonly accepted as such by the inhabitants of the neighborhood. It is marked by a cone-shaped monument of stone and mortar about five feet in diameter at the base and five feet high, and is situated on the east side of a wide cañon, about six and one-half chains east of the main highway leading from Imuris to Tubac.

From this point I run a traverse line, following the old road to Tubac as nearly as it was now practicable so to do. A list of the distance and bearing of each course of this traverse is appended hereto.

At a point on this traverse 650.86 chains north from the place of beginning I cross the international boundary line between the United States and Mexico.

After having measured a total distance of 854.73 chains along said road and at a point 749.27 chains north and 231.78 chains east of the South Cruz monument or place of beginning I reach the place known as Los Nogales. At this point the road which goes to Geubabi (Guebabi) and other points on the Santa Cruz river forks to the right and runs northeasterly from here. It is evidently the place mentioned in the "expediente" of the "Rancho Los Nogales de Elias" as Los Nogales and described as being 295 cordeles of 50 varas each distant from the South Cruz monument of the claim.

From this point I continue the traverse line northerly along the road to Tubac, and after having measured a distance of 98.25 chains along said road I find the ruins of an old monument.

The "expediente" describes the location of the North Cruz monument as being at a point on the main road to Tubac where a wide wash empties which descends from the Pajarito Mts. and about 1,000 steps from the "Calabasas" monument, which last is located on a high hill which ends ahead of the said wide wash.

The ruins of the monument which I found are very distinct and are unmistakable. Their location, furthermore, is precisely that described by the "expediente." They are at the point where a wide wash, now known as the Juan Antonio, empties into Potrero creek and south 27° 40′ west 51.05 chains or about 1,123 yards dis-
96 tant from a large and old monument of loose rock located

on the top of a high hill which ends directly ahead of said Juan Antonio wash.

Furthermore, the Juan Antonio wash is the first wide cañon descending from the Pajarito Mts. which empties into Potrero creek (along which the Tubac road runs) after leaving the point referred to in the "expediente" as Los Nogales, Russell cañon being the next one which does so, emptying at a point about two miles still further north along said road.

I therefore take this to be the North Cruz monument as established by the expediente, and place a granite stone 12 x 18 x 24 inches 1 foot in the ground and mark the same N. de E. N. + for the north end monument of the claim.

From this point I run due east on a magnetic course or S. 76° 20′ E. on a true course (the magnetic variation, as indicated by the solar attachment of my transit, being 13° 40′ E.), and at 78.71 chains I find a monument of loose rock in a fair state of preservation north about 28 feet distant. It is located on the highest point of a hill, the only one within 1½ miles easterly from the North Cruz monument, which has many oak trees on its side still standing and a great many stumps of trees recently cut down.

The location of this monument being in accordance with that given in the expediente, I accept it as the northeasterly corner of the claim and mark it as such by cutting into one of the rocks which compose the monument the letters N. de E. N. E. cor.

Returning to the North Cruz monument heretofore established, I run N. 80° 42′ W. (solar course) in the direction where the Pajarito Mts. seem from this point to end towards the north, and at 1,001.73 chains, or approximately 12.5 miles, I find an old monument of loose rock about 9 feet in diameter and 4 feet high.

The location of this monument is given in the expediente as being at the point where the Pajarito Mts. end towards the north, contiguous to the divide known as "Calaberas" pass, and it further states that the Pajarito Mts. were crossed in measuring this line and were included within the boundaries of the survey.

I could ascertain from no one, after diligent inquiry of the settlers of this locality, what was known as the "Calaberas" pass, and the only travelled and well-known pass in the Pajarito Mts. is the Calabasas, now more commonly called Noon's pass, over which passes the trail leading from Oro Blanco to Calabasas, both points in this county and Territory. As will be seen from the map hereto
97 appended, the portion of the Pajarito Mts. in Sonora, Mexico, runs easterly and westerly, making a curve to the north as they cross the international boundary. While they really do not end to the north at Calabasas pass, because at this point they join the Atascosa Mts. and continue under that name and that of Tumacacori Mts. still further north for more than 20 miles, this being the lowest and extreme north point of what is known as the Pajarito Mts., it is the only point where it may be said with any accuracy that they end towards the north. Again standing at the North Cruz monument and looking westerly towards the Pajarito Mts., owing to the high mesa which intervenes between here and the comparatively low

Calabasas pass, these mountains apparently do subside towards the north at that point.

Furthermore, there is no other point within 12.5 miles westerly from the North Cruz monument except as Calabasas pass, where a line connecting the two would cross the Pajarito Mts. Any line short of ten miles westerly from the North Cruz monument would simply end on the high broken slopes or mesas of the Pajarito Mts. and would not reach the main range.

Hence, as the monument at Calabasas pass is the only point which answers correctly the description of the northwest corner of the claim given in the expediente, I accept it as such.

Having thus established the north boundary monuments of the claim, I proceed to establish those on the south boundary as follows:

I return to the South Cruz monument, previously established and described, and from this point run due east, as pointed out by the needle, or S. 76° 20′ E., solar course, and at 199.28 chains I find a large cone-shaped monument of stone and mortar, 1.61 chains north, well known by the settlers of the neighborhood as the N. E. corner of the "Rancho de la Casita" and as the S. E. corner of the "Rancho Los Nogales de Elias."

I could not find any traces of an old monument near where the new one is now built, and, the description of the location of this point given in the expediente being quite meagre, I could find no other point which answered the description better, and therefore, as this is commonly known by the settlers as the S. E. corner of "Los Nogales de Elias" and so approved by the Mexican government, I accepted it as such.

I then returned to the South Cruz monument and run due west, according to the needle, or N. 76° 20′ W., solar course, and at 588.03 chains, or about 7.35 miles, I intersect a monument, which
98 bears unmistakable evidences of age, but which is still in a good state of preservation. It is located on a whitish ridge which divides the currents which flow southwesterly to the old Rancho Agua Caliente from those which run to Agua Zarca, adjacent to the old mining camp of Planchas de Plata, and easterly from it about one and one-quarter mile distant.

This answers very accurately the description of the southwest corner of the claim given in the expediente, and it may be added that its location on a "whitish ridge" is of singular importance in view of the fact that all the other hills and ridges over which this line passes are of a decidedly dark volcanic rock. Besides there is no other ridge which divides the currents as above stated; hence I accept this as the southwest corner of the claim.

Having thus established all of the monuments of the "Los Nogales de Elias" private land claim, I proceed to the survey of its exterior boundaries as follows:

I begin at the South Cruz monument of the claim and run thence—

Chains.

S. 75° 52′ E.; var., 13° 40′ E.

199.28 to the southeast corner of the claim; thence N. 6° 38′ E.; var., 13° 40′ E.

703.90 to the international boundary line between the United States and Mexico; runs E. & W.

876.90 to the northeast corner of the claim; thence north 76° 39′ W.; var., 13° 40′ E.

78.71 to the North Cruz monument of claim; thence N. 80° 42′ W.; var., 13° 40′ E.

1,001.73 to the northwest corner of claim; thence S. 12° 59′ E.; var., 13° 40′ E.

280.00 to the international boundary line, which runs S. 69° 45′ E.

886.56 to the southwest corner of claim; thence S. 76° 20′ E.; var., 13° 40′ E.

588.03 to the South Cruz monument and place of beginning. Instruments used, a Young & Sons' solar transit and a steel chain.

99 *Traverse Line from South Cruz Monument Northerly Along Old Road from Imuris to Tubac.*

Station.	Distance.	Bearing.
S. Cruz mon.	6.80	N. 76° 40′ W.
Tubac road	10.20	N. 10° 28′ E.
1	13.04	N. 29° 30′ E.
2	8.72	N. 35° 52′ E.
3	20.17	N. 36° 32′ E.
4	3.36	N. 17° 21′ E.
5	5.95	N. 9° 38′ E.
6	21.81	N. 23° 17′ E.
7	31.28	N. 24° 37′ E.
8	10.07	N. 15° 29′ E.
9	11.79	N. 27° 33′ E.
10	12.39	N. 34° 22′ E.
11	8.25	N. 28° 31′ E.
12	16.12	N. 33° 58′ E.
13	6.81	N. 15° 00′ E.
14	10.00	N. 18° 24′ E.
15	14.00	N. 5° 38′ E.
16	10.61	N. 25° 00′ E.
17	10.12	N. 16° 15′ E.
18	8.42	N. 31° 15′ E.
19	7.18	N. 34° 48′ E.
20	2.16	N. 35° 45′ E.
21	6.61	N. 49° 42′ E.
22	9.61	N. 42° 19′ E.
23	21.52	N. 43° 06′ E.

Traverse Line from South Cruz Nonument, &c.—Continued.

	Station.	Distance.	Bearing.
	24	12.99	N. 35° 24′ E.
	25	14.34	N. 32° 15′ E.
	26	12.37	N. 35° 26′ E.
	27	24.76	N. 39° 26′ E.
	28	10.51	N. 56° 28′ E.
	29	4.39	N. 65° 58′ E.
	30	11.10	N. 61° 41′ E.
	31	7.39	N. 17° 10′ E.
	32	8.26	N. 18° 35′ E.
	33	19.36	N. 1° 11′ W.
	34	24.19	N. 5° 41′ E.
	35	38.16	N. 3° 34′ E.
	36	34.19	N. 0° 17′ W.
	37	7.67	N. 17° 11′ W.
	38	4.03	N. 4° 47′ E.
	39	7.77	N. 17° 45′ E.
100	40	13.16	N. 34° 59′ W.
	41	2.49	S. 86° 08′ W.
	42	27.19	N. 26° 14′ W.
	43	30.07	N. 30° 37′ W.
	44	31.53	N. 17° 39′ W.
	45	27.23	N. 10° 26′ W.
	46	25.11	N. 11° 15′ E.
	47	10.83	N. 9° 36′ E.
	48	7.44	N. 1° 21′ E.
	49	53.04	N. 25° 07′ E.
	50	27.93	N. 28° 25′ E.
	51	14.58	N. 47° 58′ E.
	52	6.89	N. 65° 01′ E.
	53	20.50	N. 54° 14′ E.
	54	35.07	N. 32° 48′ E.
	5	854.73	
	Los Nogales	3.60	N. 37° 10′ W.
	55	5.03	N. 16° 35′ E.
	56	4.77	N. 57° 54′ E.
	57	6.60	N. 12° 46′ W.
	58	23.28	N. 26° 55′ W.
	59	12.14	N. 4° 40′ E.
	60	9.46	N. 1° 03′ W.
	61	33.37	N. 10° 05′ W.
	N. Cruz mon	-	
		952.98	

Tucson, Ariz., Dec. 19th, 1891. F. W. OURY.

101 By Mr. FORD: The gentlemen have raised the question as to the sufficiency of the answer of Mr. Ainsa; we now request that Mr. Camou's answer may be considered, so far as applicable, the answer of Mr. Ainsa in this case, or I will file an amended answer.

By Mr. PARKER: We have no objection to the adoption by Mr. Ainsa of the answer of Mr. Camou, so far as applicable to Mr. Ainsa's claim, but we would like to know how far that is.

By Mr. FORD: It would be better, perhaps, to file an amended answer. We have a witness here as to the possession under this grant. We will now call Mr. Peter Kitchen.

PETER KITCHEN, a witness called and sworn on behalf of the aforesaid defendant, testified as follows:

Direct examination.

By Mr. FORD:

Q. Please state your name and age, Mr. Kitchen.

A. My name is Peter Kitchen; I am growing on 75 years old.

Q. Were you in what is now the Territory of Arizona before the international boundary line was run?

A. Before they completed it I was—when they run it.

Q. Were you in the southern part of this county at or near the place called Nogales?

A. Yes, sir.

102 Q. Do you know of anybody being in possession there having a ranch or cattle? If so, who and what was that possession?

A. Well, José Elias owned it, or said he did; him and a whole lot of lower-country people there from Sonora. He didn't have it populated then, but he did right after that; he had a milk corral there.

Q. Was he living there before the line was completed?

A. I don't think he was.

Q. When did you first know of him living there?

A. Well, it was in '55 they were running the line, and he was there when they run the line.

Q. Was anybody living there then?

A. Nobody was living there then; they did right after, though.

Q. When did he have the corral there you speak of?

A. In 1856 and '57 and along there.

Q. And in what place was that, Mr. Kitchen?

A. In what they call—not Nogales now, but down below that a little way there was a large spring.

Q. About how far below?

A. Well, I think it might have been a little over a mile, a little north of where the graveyard is—little over a mile, I guess.

Q. About a mile north?

A. It might have been more, but I judge about that.

Q. How long did you know him to live there and run his ranch?

103 A. A family of them—not the whole family, but the boys—lived there a couple of years, and the Indians finally ran them out.

Q. Did you know Elias before the line was run?

A. Yes, sir.

Q. Where did he live then?

A. He lived in San Ignacio.

Q. Did he have any ranch and cattle near Nogales before the line was run?

A. He had ranches from the line of Imurez clear up through Casita and Nogales and beyond also.

Q. And that, you say, was before the line was run?

A. Oh, yes.

Q. How long before the line was run had you known that country there?

A. I came to the country in June, 1854; about a couple of years, I suppose.

Q. How were the Indians at that time in that part of the country?

A. They come and went with the moon generally.

Q. And did some of the settlers come and go at the same time, about?

A. Yes; a good many of them went.

By Mr. FORD: That is all, Mr. Kitchen.

(Cross-examination declined.)

By Mr. FORD: If the court is so inclined at this time we should be glad to argue the objection made to the introduction of the testimony as to the book of Toma de Razon. I have the authorities here and should like to be heard upon that point.

By the COURT: A majority of the court is of the opinion
104 that the evidence is competent.

By Mr. FORD: We tried this morning to get a witness who is in town to prove possession, as we endeavored to prove by Mr. Kitchen, but haven't been able to find him. We will rest now, and if the case goes over until tomorrow we will ask the indulgence of the gentlemen and of the court to offer that evidence.

By the COURT: Very well.

By Mr. PARKER: Mr. Howard, do we understand the expediente contained in your answer is in evidence?

By Mr. HOWARD: No, sir; I have not offered that.

By Mr. PARKER: We have, if your honors please, an instrument in writing in the Spanish language purporting to be the original testimonio of a grant made to Camoux in the year 1886, pleaded by the defendant Camou, and filed with his answer in this case, and a translation of the same document with a map attached thereto and the title attached. This covers a portion of the land now claimed in this case south of the line between the United States and Mexico, and from this expediente is taken and upon it is based a certificate appended to the original expediente offered by the defendants in this case this morning.

By Mr. HOWARD: It is questionable whether it is or not.

105 By Mr. PARKER: No; it is not. The identity of the two will be apparent.

By Mr. FORD: We object to that generally and specifically for our client, Ainsa, and our grounds of objection are these:

The title papers introduced so far show, as we understand, that a grant by way of sale was made by the Mexican government prior to this treaty. Upon the change of sovereignty the rights of the owners of such property, if property it was, became fixed, and they had such rights as the treaty provides. The treaty makes certain stipulations as to the preservation of property and as to what grants shall be recognized. Long after, in 1886, I believe, for I never have seen this paper, though I am apprised in a general way of its contents, certain proceedings are gone through with in the Republic of Mexico. Now, the gentleman very properly a few minutes ago suggested that such proceedings had no extra-territorial effect. I believe that was the apt phrase of law in which he stated his objection to some documents, and that is the objection we have to this document. Proceedings gone through with between the Republic of Mexico and Mr. Camou as to these proceedings are *res inter alios*, the parties are not the same, and the Government is not bound
106 by these proceedings. Our objection is that it is irrelevant, incompetent, and immaterial as to any rights in the United States, because it was a proceeding done after the treaty in another jurisdiction; that Santiago Ainsa is not a party to it and the document, if it have any effect, is not authenticated as required by law.

By Mr. PARKER: The Government also offers a resurvey of the ranch of La Casita, which was made under an order made at the same time and included in the original testimonio in this case made in 1841, which was petitioned for by the same persons, made by the same surveyor at the same time that the survey was made on which the original grant in this case is founded.

By Mr. FORD: We object to that on the same ground, and because it is another ranch entirely; also as irrelevant and incompetent and as having no bearing whatever upon the grant here in question.

H. O. FLIPPER, a witness called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. PARKER:

Q. What is your name?
A. Henry O. Flipper.
Q. What is your profession?
A. Civil engineer.
107 Q. Where do you reside?
A. Nogales, Arizona.
Q. Have you examined the testimonio of title issued to Camou in 1886 based upon a survey made in 1882?
A. I have, sir.

Q. Have you made computation of the area of land included within that survey?

Objected to because any proceeding in 1886 by the Mexican government comes within the reasons last assigned and *there* is irrelevant, immaterial, and incompetent and not binding on the parties herein.

By the COURT: It may go in under the objection.

A. I have, sir.

Q. (Exhibiting document.) Is that a statement of the computation as you have made it?

A. Yes, sir; this is it.

Q. How much land does that survey show was included within the Los Nogales de Elias grant within the Republic of Mexico?

By Mr. FORD: It will be understood that all this is subject to the same objection that no proceeding in the Republic of Mexico has any binding force in this tribunal.

A. According to the survey of 1882 there was 7.937 sitios.

Q. State where.

A. All in Mexico.

By Mr. FORD: We make the further objection that our client was no party to this proceeding inquired about and therefore it cannot bind him.

Q. Have you made a computation of this survey shown by
108 the expediente in 1882?

A. I have.

Q. How much land does that survey show was included in the Nogales de Elias grant within the territory of the Republic of Mexico?

A. 7.937 of a sitio.

Q. How many acres is that?

A. 34,434.19 acres.

Q. How many acres in $7\frac{1}{2}$ sitios?

A. 32,744.07 acres.

Q. Does that include the two short caballerios?

A. Yes, sir.

Q. That includes the exact amount included in the first expediente?

A. Yes, sir.

Q. You made a computation of that also?

A. Yes, sir.

Q. How much did that leave in Mexico over and above seven and one-half sitios?

A. 1,690.12 acres.

Q. I will go to Mr. Oury's survey now. Have you examined the map of Mr. Oury and the figures in the border of the map?

A. Yes, sir; I have.

By Mr. PARKER: The map to which I refer is the map of Mr. Oury which is stipulated into this case.

Q. According to the survey of Mr. Oury how many acres was there—what was the total area in acres of the Los Nogales de Elias grant within the outer boundaries of that grant?

Objected to because the map speaks for itself.

A. I haven't that. I have the area in Mexico only.
Q. How many acres does that show?
A. 52,969.25 acres in Mexico.
Q. In sitios—have you reduced it to sitios?
A. I have.

109 Q. How many sitios does it show within the Republic of Mexico?

A. 12.21 sitios.
Q. Have you made a computation of that, showing the amount or sum of seven and one-half sitios, and the land which was included within the territory of Mexico granted by this expediente of 1886?
A. I have, sir.
Q. What is the sum of those two grants?
A. 7.937 sitios.
Q. Deducting that from the amount of land which Mr. Oury's survey shows is within the territory of Mexico, how much is left?
A. 4.272 sitios.
Q. That is all within the territory of Mexico alone?
A. Yes, sir; all in Mexico; that is the excess above both titles.
Q. Above the title of—— (Interrupted.)
A. Of 1843 and 1886.
Q. Have you made a computation of the total number of sitios in the Los Nogales de Elias grant as shown by Mr. Oury's survey?
A. Yes, sir.
Q. What is that sum?
A. It is 18.17 sitios.
Q. Deducting the seven and one-half sitios and two short caballerios of land as shown by the original expediente in evidence in this case, how much would be left from the whole grant?
A. Subtracting the 7½ sitios?
Q. Yes, sir.
A. Oh, about 11 sitios.
Q. And subtracting the sum of both titles from the grant, what would be left?
A. I don't understand the question.

110 Q. Subtracting the sum of 7½ sitios, the amount in the original grant, and the amount included within the territory of Mexico granted by the grant of 1882.

A. From the 18?
Q. Yes, sir.
A. It would leave about eleven sitios.
Q. Something like eleven sitios?
A. Yes, sir.
Q. And in acres?
A. 44,187 acres.

Q. How many acres did you say were in 7½ sitios and two short caballerios of land?

A. 32,744.07 acres.

Q. How much land in the territory of Mexico was included in the second grant?

A. .389 of a sitio; that is the demasias in Mexico, according to the first survey—1,690 acres.

Q. You have made an examination of this Oury map?

A. Yes, sir.

Q. Show to the court the initial point of the survey made in 1841.

A. This point (indicating on map).

Q. How is that described?

A. It is a monument at the present time—a stone monument.

Q. What lines would describe it?

A. It is the north-cross monument of the Casita ranch and the south-cross monument of the Nogales.

Q. What crosses the Casita line?

A. The north line of the Casita is the south line of the Nogales.

Q. What crosses the line at that point (indicating)?

A. The Tubac road.

Q. That (indicating) is the point where the Tubac road
111 crosses the north line of the Casita?

A. Yes, sir.

Q. And that is what he took as the initial point?

A. Yes, sir.

Q. Thence where did the surveyor go?

A. The description shows that he went along this road (indicating).

Q. Along the Tubac road?

A. Yes, sir; along the Tubac road to the north cross-monument here (indicating).

Q. Now, what is the length of that line according to the survey in the original expediente offered in this case?

Objected to because it speaks for itself.

A. 340 cords.

By Mr. PARKER: This is merely for the information of the court.

Q. Did you ever measure that line yourself?

A. Yes, sir.

Q. What is the measurement?

A. 340 cords.

Q. What is that in chains?

A. I will get my book and tell you (retiring and returning with memorandum book). I did not reduce the 340 cords to chains, but can do so if you wish it.

Q. Well, you may do so.

A (Computing.) 710 chains.

Q. What is the actual length of that line?

A. The actual length of that line is 449.82 cords. I have it in cords.

Q. I will go back and go over that examination again. His survey shows, as I understand you, that the distance between the two cross-monuments is 340 cords, and, as a matter of fact, it is what?

A. 449.82 cords; 149 cords longer than is called for.

Q. By measuring 340 cords up that road where would
112 such measurement take you with reference to the line between the United States and the Republic of Mexico?

A. It would stop three cords south of the line; the distance is 343.54 cords to the line.

Q. About what is that distance?

A. A cord is 137 feet. It would therefore be about 411 feet.

Q. You never measured these boundaries?

A. No, sir.

Q. Now, I will ask you with reference to these monuments—with reference to that first monument—south cross-monument of the Nogales Elias and the north cross-monument of the Casita. Describe that in its present condition to the court.

A. It is a monument built of stone and mortar about six feet high and about eight feet in diameter, in the shape of a truncated cone, with the top rounded off. I can just look over it standing by it.

Q. That is the hight of it?

A. Yes, sir.

Q. Have you examined the southeast corner monument as shown by this resurvey here?

A. Yes, sir.

Q. What is its description as compared with the south cross-monument?

A. It is a similar monument, slightly smaller, built exactly in the same way—same form.

Q. What is its apparent condition with reference to age as compared with the south cross-monument?

A. It was evidently built by the same person at the same
113 time that built the south cross-monument.

Q. Have you been to the southwest monument?

A. I have, sir.

Q. Describe that.

A. The southwest monument is the same as the other—about the same size as the southeast monument, built in the same manner and about the same time.

Q. Have you been to the north cross-monument?

A. I have, sir.

Q. Describe that to the court.

A. The north cross-monument is a mound of earth and pebbles about 18 inches high, about 10 to 12 feet in diameter; one large stone there 11 or 12 inches square, on which is marked "N. de E. N x."

Q. And you translate that to mean——

A. Nogales de Elias north cross-monument.

Q. What is its condition with reference to age as compared with this south boundary?

A. Well, I don't think it is a monument at all; I don't think it ever was. It looks more like an ant hill; about twenty steps from it, in a northeast direction, is another exactly like it, except the large stone I have described is not there. There is probably half a dozen stones there that the largest dimension would be 6 inches, the rest about half the size of my fist and smaller.

Q. Yes?

A. It has not the appearance of being a monument.

Q. Were you ever at the northeast corner monument?

A. Yes, sir.

Q. Describe that.

A. It is a pile of loose stones about four feet high, proba-
114 bly four feet in diameter, built in a circle shape.

Q. Any indications there as to age—as to how long that pile had been there?

A. It is a recent monument.

Q. It is recent?

A. Yes, sir.

Q. Do you mean to be understood as saying that this was constructed of mortar and stones or loose rock?

A. Loose rock; no mortar at all.

Q. How about the north cross-monument?

A. The north cross-monument was just the mound I speak of; it looks more like an ant hill than anything else—about 18 inches high.

Q. Constructed of mortar or stone?

A. No, sir; no indication of mortar whatever.

Q. The northwest monument?

A. I did not go to that monument.

Q. With reference to these monuments at the southern boundary, state as to their age; state what their appearance is as to age.

A. In the expediente of the survey of 1882, it is stated that that monument was built then.

Q. Yes, I understand; leave that out. I am getting at your judgment.

A. They are recent monuments beyond any question.

Q. Recent?

A. Yes, sir; beyond any question. I never saw any monuments like that anywhere in Mexico.

Q. Starting from the south cross-monument and running along the Tubac road 340 cords, then measuring to the east 22 cords and
115 to the west 200 cords, then returning to the south cross-monument and measuring east 22 cords and to the west 200 cords, will you reach any of those monuments?

A. Not one of them except the one you start at.

Q. I will get you to state if you could go to any one of those monuments (interrupted)——

By Mr. HOWARD: I object to all these questions as irrelevant and immaterial as to the location of these monuments.

By Mr. PARKER: Yes; it is understood all this is objected to.

Q. I will ask you if you could go to any one of these monuments and, taking the measurements—for instance, go to the southeast corner and, taking the measurement in the survey as correct, if any of the measurements will take you to any of the other points.

A. It will not.

Q. How much will it lack—say, start at the south corner monument, how much will it lack of reaching the southwest corner, according to the survey?

A. The survey calls for 22 cords.

Q. That is east?

A. Yes, sir.

Q. The survey I am speaking of is the original survey in the testimonio of 1843. Now, you have already testified that going the 340 cords along that road will stop you away south of the line?

A. Yes, sir.

Q. Now, going east 22 cords, how far or where will that take you?

A. From the starting point?

116 Q. Yes, sir; from the same starting point how far will that take you?

A. Starting here and going east?

Q. Yes, sir; 22 cords.

A. About one-fifth of that distance.

Q. Going west 200 cords, how far will that take you?

A. About half of that distance—I have a memorandum of it here—no, about two-thirds of that distance, according to my memorandum.

Q. Commencing at the north cross-monument and going east 22 cords, how far will that take you as to the northeast corner?

A. About one-third of the distance.

Q. And starting from the same north corner monument—cross-monument—and going west 200 cords, how far will that take you with reference to the northwest monument?

A. That will go about one-third—not quite one-third—of the distance.

By Mr. FORD: All this is objected to on the ground that where there are fixed objects those objects control over the measurements, and it is therefore immaterial whether the measurements are prolonged or cut off. Courses and distances give way to fixed natural objects.

Q. (Exhibiting map.) I call your attention to the map made part of the expediente of 1886, a survey purporting to have been made by Florencio Rosas, and ask you if you can tell from this map what distance Mr. Rosas found between the south line of the Los Nogales de Elias and the line between the United States and Mexico.

117 By Mr. FORD: We make the same objection as to that map as incompetent and irrelevant.

A. He does not give the distances on here between the starting point and the boundary line.

Q. He doesn't give it?

A. Not on this map; no, sir. He makes Nogales south of the line.

Q. Is there anything on that map from which you can tell about how far Mr. Rosas made the distance between the south line of the Nogales and the line between the United States and Mexico?

A. There is nothing on here that would show the distance along the road, but the east boundary line of this tract would show approximately the distance along the road. This distance here is about four leagues; the distance measured is 340 cordels, which is 3.4 leagues.

Q. So it is something like (interrupted)——

A. Something like six-tenths of a league greater than 340 cords.

Q. (Exhibiting paper.) What is that?

A. This is an extract from an official report of Mr. Fourcade and Mr. Quijano.

Q. Where is the original of that?

A. In the district court in Guaymas.

Q. Did you ever see it there?

A. I have.

Q. Is this a correct copy of it?

A A correct copy of that part of it.

Q. What does that part of it cover?

118 A. Rancho Nogales de Elias that part of it on the Mexican side.

By Mr. PARKER: We offer it in evidence and the translation of it.

Objected to because it is an extract of a report of some government surveyor showing that that part of the Nogales de Elias grant in Mexico contains a certain amount. It is not sworn to and it has no official effect. The witness is not here to be cross-examined as to the accuracy of it. It is the purest hearsay under all the rules of evidence. It is also incompetent and irrelevant.

By the COURT: Under the rule we have already made in this case if this is a record we will consider it, but will have to look into the whole matter before determining whether it is competent or not.

Q. According to this survey how many hectares—the measurements there are according to the metric system?

A. I have it in both.

Q. According to this survey how many sitios are there in this grant in the Mexican territory?

A. 8.192 sitios.

Q. According to that survey how much more land than the seven and one-half sitios and two short caballerios?

A. According to the survey on the Mexican side of the line in excess .255 of a sitio.

119 Q. In excess of the first title?
A. .677 over the first title.
Q. How many acres would that be, about?
A. 2,400 acres.
Q. 2,400 acres more than the 7½ sitios and two short caballerios?
A. Yes, sir.

Cross-examination.

By Mr. FORD:

Q. Were you present when this survey was made by Mr. Fourcade?
A. No, sir.
Q. Do you know of your own knowledge whether this survey made by him is correct?
A. No, sir; I do not; I believe it is, though. He is a perfectly competent surveyor.
Q. All you know is you copied this from some statement of his?
A. I did not copy it; I saw it in his report.
Q. You copied it in his report?
A. I did not do the copying; I read it in his report.
Q. You had this copied from the report?
A. Yes, sir.
Q. All you know is this is a copy from some report that he made?
A. Yes, sir; I know that he made the report.
Q. But whether he actually made the survey you do not know of your own knowledge?
A. I wasn't on the ground. I worked with him in the office when he was making the maps and reports.
Q. Did he actually make the survey? Do you know that of your own knowledge?
A. No; I do not.
120 Q. You said that whether correctly made, if made, you do not know of your own knowledge?
A. I do not know, but I believe it to be correct.
Q. You know that he made some report, and you made this extract from the report?
A. I did not make it, but I know it is an extract from the report. Another person did the mechanical work.
Q. Did you ever compare this with the report?
A. Yes, sir.

By Mr. FORD: We submit this is pure hearsay, and if this be a competent way to prove an extract from a report we say the report itself is of no effect.

Q. Do you know as a matter of fact that some of the corners spoken of in this Nogales de Elias title paper were arrived at by estimation?

A. Arrived at by estimation? It is so stated in the expediente.
Q. It is so stated in the expediente?
A. Yes, sir.
Q. Which ones were arrived at by estimation?
A. The northwest monument.
Q. Which other, if any?
A. I don't remember which other.
Q. You do not know whether the southwest was arrived at by calculation?
A. I think it was, but I am not certain. I know, though, absolutely that it is not now where it ought to be as described by that paper.

By Mr. FORD: We submit that is a mere conclusion of the
121 witness and has no bearing whatever on the question asked him.

Q. How was the northwest monument arrived at?
A. Measured part of the distance and estimated the other from point to point across the hill
Q. How far was it measured and how far was it estimated?
A. Measured about fifty cords, if I remember right, and estimated the other 150.
Q. How about the southwest, if you know?
A. I do not remember. I don't remember how much was measured and how much was estimated. I do not remember that.
Q. Do you know where there is a pass in that immediate vicinity is called the Calabasas pass?
A. Yes, sir.
Q. Where is that with reference to the international boundary line?
A. North of it.
Q. About how far?
A. Well, I don't know. I never have been to the pass. I didn't go to that northwest monument.
Q. (Exhibiting map.) Please examine that map, Mr. Flipper. Are you prepared to say whether the Calabasas pass is at or near the point designated on that map as the northwest corner?
A. I have stated that I did not go to that corner, and it is not the Calabasas pass anyway, it is Calaveras pass in one of those expedientes; one say- Calabasas and the other says Calaveras.

Q. Is it called the Calabasas pass in this expediente?
122 A. I do not know what it is in that, but I have seen it both ways in these papers.
Q. (Handing witness a document.) Look at it and see.
A. Calaveras, this says.
Q. Do you know where that pass is?
A. I do not; I never saw any one that did.
Q. Do you know where the Pajarita mountains are?
A. Yes, sir.
Q. Is the north line of those mountains north or south of the international boundary line?

A. The north end is north of the international boundary line.

Q. Where the end of the Pajarita mountains subsides towards the north is that north or south of the international boundary line, if you know?

A. It is north.

Q. Do you know how far north?

A. I do not; I never was there.

Q. Does that point designated as the northwest monument correctly show where the end of the Pajarita mountains subsides towards the north or do you know that?

A. I will have to assume that this correctly represents the Pajarita mountains, which I am not prepared to do.

Q. I ask you if that map does correctly represent that; does that represent the Pajarita mountains so far as you are acquainted with the country.

A. No, sir; the Pajarita mountains cross the Mexican boundary line and runs quite a distance south.

123 Q. How about the north?

A. You asked me if they were correctly represented on the map and I said no.

Q. Does that correctly represent them running north?

A. More or less; yes, sir. I think they are a little too far west on this. I think they run more nearly perpendicular to the boundary line, more than parallel to it.

Q. You have not made a survey so you can say accurately?

A. I haven't been there.

Q. Do you know where the place called Los Nogales is by common reputation?

A. Yes, sir.

Q. Yes, sir. Where is that?

A. About a mile and three-quarters from the present town of Nogales, a shorter distance north of the line.

Q. Is that place correctly designated on that map, or approximately?

A. I should say so; yes, sir.

Q. Mr. Flipper, starting from the point called the North Cruz monument as indicated on that map and running a distance indicated by that map, is there or is there not a monument of loose rock located on the high point of a hill?

A. Running as indicated here?

Q. Yes, sir.

A. Yes, sir; I have so testified.

Q. A monument of loose rock?

A. Yes, sir.

Q. Is it on a plain or on a hill?

A. It is on a hill. That monument is also marked.

124 Q. The northwest monument you have not been to?

A. No, sir; I haven't been to that.

Q. What do you say as to the accuracy of that map in representing as the south line of the Nogales grant the north line of La Casita?

A. I know nothing about the Casita, sir.

Q. You do not know, then, as a matter of fact, whether the South Cruz monument of the Nogales is the North Cruz monument of the Casita?

A. I know it because the expediente so states. The expedientes of both grants state so.

Q. I am speaking of the location on the earth's surface. Do you know the northern boundary of the Casita ranch on the earth's surface?

A. I do not, sir.

By Mr. FORD: I think that is all.

Redirect examination:

Q. In answer to a question of Mr. Ford you say the north line west of the North Cruz monument was measured as to fifty cords and estimated as to 150. What am I to understand by "estimated," what word is used—— (Interrupted.)

A. I do not remember the word used in the original. I think it is "calcular."

Q. Is that "estimated"?

A. It means to calculate; yes, sir. I do not know that that is the word.

Q. We will find out whether it is or not (referring).

By Mr. FORD: I would like to ask the witness one other question.

125 By Mr. PARKER: Very well.

By Mr. FORD:

Q. Returning to the South Cruz monument and running west the distance designated on that map, do you find a monument at the point called the southwest corner there?

A. Yes, sir.

Q. And is not that on a whitish ridge?

A. It is built right on a rock. The whole monument is built on a rock.

Q. Is the rock itself on the ridge?

A. It is the point of a ridge; yes, sir.

Q. Yes?

A. But the expediente says that hill is white because of the grass and not because of the rock.

Q. There is no monument on the northeast corner, is there, running from the South Cruz monument the distance designated on that map?

A. Running from the South Cruz monument?

Q. Yes, sir; the distance measured to the southeast corner.

A. Yes, sir.

Q. What sort of a monument?

A. Stone and mortar.

Q. A new monument, is it not?

A. I judge it to be a new monument.

Q. Different from the other?

A. No; identical, except the South Cruz monument is larger than the other two.

Q. They are all new, apparently?

A. Yes, sir; all apparently new.

126 Q. They are materially different from the northeast monument?

A. Entirely so.

Q. And the northwest monument you don't know anything about?

A. No, sir; nothing.

Q. The North Cruz monument is what?

A. A low mound, probably 18 inches above the surrounding ground and probably 11 or 12 feet in diameter.

Q. Do you know whether it is true as a matter of fact that throughout a large part of Sonora monuments of late years marking mining claims and grants have been put up similar to the monuments you describe as the three southern ones?

A. I have been in Mexico since 1882 and I never have seen any like those three monuments, in no part of Mexico.

Q. I believe you stated the place called Los Nogales is correctly stated or indicated on that map, so far as you know?

A. Yes, sir; it is.

Q. Of course, I am not speaking of the town of Nogales.

A. I understand what you mean.

Q. About north of the town a mile and a half?

A. I said a mile and three-quarters.

By Mr. PARKER:

Q. (Exhibiting document.) In this testimonio I will get you to read or translate correctly the question that the surveyor propounds to Mr. Elias when he arrives at the north cross-mon-

127 ument.

A. "Having interrogated the party to tell to me the land he wished in this square, he replied to me that towards the east he wanted twenty cords."

Q. I do not care for the reply. That is all.

Government rests.

By Mr. FORD: If your honors please, I should like to communicate with Col. Herring in regard to the formal deraignment of the title of his client, because that is a matter I am not prepared upon, and inquire of him whether he has filed all the papers he intended to file, and if he has not that he may send them over to me and have me file them in the case. I refer to the mere formal deraignment of title.

By the COURT: Very well.

By Mr. FORD: Apart from that we are quite through.

By the COURT: Very well; you may proceed with the argument.

Mr. Ford opened the argument for defendants.
Mr. Howard followed for himself and Camou.
Mr. Franklin closed for defendants.
Mr. Parker followed for the Government.

128 (*Translation of Expediente.*)

Duplicate.

No. 179.

Don Jose Elias for himself and in the name of his co-tenants in the remnants of the public lands lying and being between the ranches of La Casita, the mission of Tumacacori and Calabazas, in the jurisdiction of this agency, on twenty-nine legal leaves composing the deed of grant of seven and one-half sitios, short, for cattle and horses of said remnants, which was issued by the treasury general in 1842, and was adjudicated in favor of the said Mr. Elias and his parents, Don Franco. Gonzales and Dona Balvanera Redondo.

It is recorded under number 179 in the referred book.

Hermosillo, July 31 of 1885.

FLORENCIO MONTEVERDE.

129 Title papers of the grant of seven and one-half sitios and two caballerios of land for raising cattle and horses, comprised in the remnants of public lands lying and being found between the northern boundary of the ranch of La Casita and the western boundary at the jointure of Tumacacori and Calabazas, in Pimeria Alta, petitioned for in favor of Don Jose Elias and his parents, Don Franco. Gonzales and Dona Balvanero Redondo, residents of the town of Imuris.

Ygnacio Lopez, retired captain of cavalry of the army and treasurer of the department of Sonora:

Inasmuch as article 11 of the general sovereign decree of the 10th of August of 1824, donates to the old States the revenues which in said law were not reserved to itself by the general government, among which one of them is that arising from the lands in their respective limits which belonged to them, in consequence thereof and for the disposition of them, the honorable constituting congress of the State that used to be united of Sonora and Sinaloa, promulgated the law number 30 of the 20th of May of 1825, as well as the subsequent legislatures passed other decrees on the same subject, which dispositions have been compiled into sections 3d, 4th, 5th, 6th and 7th, of chapter 9th of the organic law of the treasury department number 26 of July 11th of 1834, being now the said land revenue one of those belonging to the department of Sonora, which have existed and must continue to be by the provisions of article 1st of the decrees of 17th of April of 1837, of the 28th of the same month of 1839, and of the 24th of December of 1840, as well as by the supreme order of the 21st of the same month and year.

130 And Don Jose Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, residents of the town of Ymuris, having made application for the survey, appraisement, publication; and purchased at public auction for seven and one-half sitios and two "caballerios" not quite full, of land, for raising cattle and horses, to which amounted the remnants of public lands found between the northern boundaries of the ranch of La Casita, and the western boundaries of the mission of Tumacacori and Calabazas, situated in the Pimeria Alta of the district of San Ygnacio, the proceedings thereof being word for word as follows:

Francisco Navamuel, judge, commissioned to survey some unoccupied public lands taken up by Don Francisco Gonzales:

I certify that the superior chief of the treasury of the department hacienda has remitted to me the copy of an expediente for lands, with an order of resurvey, which says:

Chief of the treasury of the department of Sonora:

I forward to you, in ninety-two legal leaves, the expediente, in favor of Don Jose Elias, for himself and in the name of his parents Don Francisco Gonzales and Doña Balvanera Redondo, for the resurvey of the ranch of La Casita of which they are owners and possessors, situated in the jurisdiction of the town of Ymuris, and also for the resurvey, appraisement and publication of the remnants of public lands which they say they need; in order that you may proceed to execute said (proceedings) operations, confining yourself in all things to my orders in the commission which, for the purpose, I enclose to you, dated today, in the same expediente herewith joined; for which I also enclose the proper enabling appointment.

God and liberty.

Ures, May 26th of 1841.

JOSE MARIA MENDOZA.
DON FRANCISCO NAVAMUEL.

And at the bottom of said process is an order as follows:

131 URES, *May 26th of* 1841.

Having received today from his excellency the governor, and president of the superior board of the treasury of the department, the duly authorized copy provided for by article 76 of the decree of April 17 of 1837, containing various rulings sanctioned by said board at the session of the 22d of the present month; it appears that one of them is of the following tenor:

The second ruling is the petition of Don Jose Elias, praying for the resurvey of his lands as he asks, and also for the survey of the remnants which he takes up, subject to the requirements in due form for their sale; making separate expedientes for both properties, making a report about the first to the board, so as to determine as to the result of the resurvey.

And in compliance with exact obedience thereto, the proper commission is issued to Don Francisco Navamuel, so that without damage to third parties who may have a better title, and with previous notification to the interested parties and the adjacent owners who shall present themselves with their title papers, by themselves or by attorney, to show and defend their metes and bounds, having in view the aforesaid hereto joined testimony concerning the lands of La Casita, the property of Don Jose Elias, and of his parents Don Francisco Gonzales and Doña Balvanera Redondo, situated in the jurisdiction of the town of Ymuris, let him proceed to the exact and scrupulous survey of the same lands, giving them the area or number of sitios that legally belong to them; making the proper separation or division, minutely and in a — manner, of the sitio or sitios that may result in excess, within the legal boundaries of the said lands of La Casita; and at the proper time, said commissioner shall make the proper survey, appraisement and publication in a separate expediente of the remnants of the public lands
132 petitioned for by the interested parties; for which purpose, intervening the previous and indispensable judicial information which the commissioner himself, under his most strict responsibility, shall cause to be taken before a competent judge, and he shall append the original thereof to the expediente which shall be by three witnesses impartial, competent, honest and of practical knowledge, by which it may appear judicially and sufficiently, that the interested parties who petition for said remnants of the public lands, are in need of them on account of abundance of cattle to settle on them; acting in perfect accord with the foregoing inserted order of the superior board of the treasury of the department, and with the provisions, respectively, of sections 3d, 4th, 5th, 6th and 7th of chapter 9th of the organic law of the treasury, number 26, of July 11, of 1834, as well as with the regulations made for the survey of lands for cattle and horses, in compliance with the provision of law number 30 of May 20th of 1825, determining the sitio or sitios comprised in the aforesaid lands of La Casita, its demasias, if it has any, and the remnants of the public lands already mentioned, in conformity to the said regulations, and the old and constant rule, to multiply the number of varas forming the diameter from south to north, by the number of those from east to west, to give to each sitio the area belonging to it of twenty-five millions of square varas; reminding you, the aforesaid operations having been carried out, the excess or demasias that may result within the true boundaries of said rauch of La Casita, these should not be published for sale, but appraised in accordance with article 2d. of the decree number 51 of May 12th. of 1835. And the expedientes being concluded, you shall forward the originals to this department, summoning the interested parties, so that they, in person or through an attorney, may hear the resolution made on the subject by
133 the board of the treasury.

The superior chief the same (the treasury) of the depart-

ment of Sonora, so provided, ordered and signed it, with the assistant witnesses.

JOSE MARIA MENDOZA.

Assistant:
JUAN ANTUNES.
Assistant:
FACUNDO DIAZ.

In witness whereof so I certify and sign, at the town of Magdalena on the second day of the month of October of one thousand eight hundred and forty-one, before the witnesses of my assistance, in default of clerk, there being none according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

At the same town, day, month and year, I, the said commissioner, said, that in order to proceed to the survey of the remnants of the public lands adjacent to the ranch of La Casita, an expediente should be instituted (and added) following this process, as ordered by the honorable chief of the treasury. To that purpose, let Don Francisco Gonzales and the adjacent property owners be summoned for the 25th. day of the current month, in which the surveys will commence.

So I decreed and signed it with my assistant witnesses.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
——— ———.

On the same date I ordered to proceed to take the information provided in the superior order of the hon. chief of the treasury, which, by authentic copy, forms the beginning of the expediente.

For that purpose I addressed an official communication to the justice of the peace of the town of Ymuris, with which, while forwarding the order to the hon. chief, so that he may assist me legally in whatever may occur in the discharge of my commission, I urged him to take the indicated information, as it is easier to find in his town witnesses who by reason of the proximity to the ranch where the interested parties have their property, may be more apt to be acquainted with all the circumstances necessary (to be investigated).

134 I so decreed, ordered and signed with the witnesses of my assistance.

FRANCISCO NAVAMUEL.

Assistant:
JOSE L. GALLEGOS.
Assistant:
SIMON MARIN.

I accompany herewith the adjoined document that through me is forwarded to you by the hon. the superior chief of the treasury; and in accordance therewith I trust you will please take the information of three witnesses, endowed with impartiality, probity and practical knowledge, by which it may be determined sufficiently if Don Francisco Gonzales has or has not need of the remnants of the public lands existing between the ranch of La Casita and that of Calabazas, and also, if heard his wife have abundance of cattle to occupy them. And after the same is concluded, you will have the goodness of returning the original proceedings so as to attach them to the expediente on the subject.

God, &c.

Dated October 3d of 1841.

To the justice of the peace of the town of Ymuris, Magdalena, October 12th, 1841:

Let the information forwarded to me by the second justice of the peace of Ymuris be attached to the expediente; and it being proved in it that the parties have need of the lands they have registered, let the surveys be made on the 25th of the current month as has been ordered.

So I decreed and signed it with the witnesses of my assistance.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

I accompany herewith the adjoined information, which by your communication of October the 4th you solicited from this court, of three impartial witnesses, which are contained in two legal leaves (of paper) and with this I present you with my high respects.

God and liberty.

Ymuris, November 8th of 1841.

JOSE FRAIJO.

To Don Francisco Navamuel.

135 Court of Ymuris, in the town of Ymuris, on the sixth day of the month of October of one thousand eight hundred and forty-one.

I, the judge of this town, the citizen Jose Fraijo, in view of the foregoing communication, proceeded to take the information of three impartial, trustworthy and practical witnesses.

I so ordered and signed it with the witnesses of my assistance, in default of clerk, according to law.

JOSE FRAIJO.

Assistant:
EDUARDO SOTO.
Assistant:
MANUEL SOTO.

Forthwith I caused to appear before me the citizen Francisco Armenta, resident of this town, whom I certify to know, and with all the formalities required by the case, he being asked if he knew that Don Francisco Gonzales and his wife Doña Balvaneda Redondo had any cattle in abundance to occupy the remnants of the public lands existing between the ranch of La Casita and Calabazas, he said:

That between Don Francisco Gonzales and his wife, they have, more or less, about four thousand head of cattle; and this he declares because he has attended the gathering of cattle when said Don Francisco has employed him for the runs (rodeos). And this is what he can say to what he has been asked, which I sanctioned and signed with my assistance according to law, which I attest.

JOSE FRAIJO.

Assistant:
EDUARDO SOTO.
Assistant:
MANUEL SOTO.

Forthwith, I caused to appear before me the citizen Domingo Soto, resident of this town, of probity and practical knowledge, and with all the formalities of style, being asked, if he knows that Don Francisco Gonzales and his wife have sufficient cattle to occupy the remnants of the public lands existing between the ranch of La Casita and Calabazas, he said:

That the said Don Francisco has about four thousand head
136 of cattle and some sheep (or goats). And it is all he says on the subject; which he signed with me and my witnesses according to law.

JOSE FRAIJO.
JOSE DOMINGO SOTO.

Assistants:
EDUARDO SOTO.
Assistant:
MANUEL SOTO.

On the same day, month and year, I caused to appear before me the citizen Luis Villa, resident of this town, whom I certify to know, of probity and practical knowledge, and being asked with all the formalities of style, if he knows that Don Francisco Gonzales has sufficient cattle to occupy the remnants of the public lands existing between the ranch of La Casita and Calabazas, said:

That Don Francisco Gonzales has one hundred and one thousand head of cattle and some sheep (or, goats); which is all he says on the subject asked. He did not sign because he knows not how, which I did with my assistants according to law, which I attest.

JOSE FRAIJO.

Assistant:
EDUARDO SOTO.
Assistant:
MANUEL SOTO.

The foregoing information being concluded let the originals be returned to the surveying judge for the proper ends. I, the justice of the peace, so decreed, ordered and signed, in testimony of the same.

JOSE FRAIJO.

Assistant:
EDUARDO SOTO.
Assistant:
MANUEL SOTO.

At the said town on the third day of said month and year, I communicated the foregoing proceedings to Don Francisco Gonzales, and acknowledging it, said he heard it, and signed it with me and witnesses of my assistance.

FRANCISCO NAVAMUEL.
FRANCO GONZALES.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

On the same date; and the interested party having notified me that the adjacent owners of the public lands I am going to
137 survey, are only the ranch of La Casita the property of the said Gonzales, and that of Calabazas, belonging to the mission of Tumacacori, which is in charge of the Rev. father president and minister of these missions, Fry Antonio Gonzales; his reverence was summoned so that in his own person or by attorney, he should be present with the corresponding titles to mark and defend the metes and bounds of the said ranch of Calabazas, in which summons he was shown the commission with which I am charged; whereupon I was answered verbally, that Don Marcello Bonillas had special power for the purpose from his reverence, whom he would send with the respective titles and with the necessary instructions to settle with me:

In witness whereof, I authorized it and signed it with my assistant witnesses.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

I certify that for the absolute want in all these parts of stamp paper, I am using this common paper, with the protest made by the party (interested) to replace it on the first opportunity.

FRANCISCO NAVAMUEL.
JOSE GALLEGOS.

At the ranch of La Casita on the twenty-fourth day of the said month and year, the surveys of this said ranch having been finished, as appears from the principal expediente; for this reason, and also

because the adjacent owners and officials being present, I proceeded to the survey of the remnants of the public lands, notwithstanding it having been before determined to begin them tomorrow.

For that purpose I appointed as chainmen the citizens Angel Olave and Miguel Fraijo, and as compassman the citizen Jose Gallegos, who, being informed of their appointments, made oath before me by the Lord our Savior and by the sign of the cross, to discharge their duty well and faithfully, commensurate with their intelligence.

138 So they signed it, those that could, with me and the assistant witnesses.

FRANCISCO NAVAMUEL.
JOSE GALLEGOS.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

Subsequently, and being at the cross-monument of the north of the ranch of La Casita, in company with the parties, the adjacent owners, the officials and other persons that went with me on account of this being a dangerous defile, I caused a cord to be made on which were measured fifty varas, and with which I began the survey from the said place, following the public road that goes towards the north for the presidio of Tubac, and there were measured and counted two hundred and ninety-five cords until they reached the place called Nogales, when I stopped, the sun being about down and because Don Marcello Bonillas, the attorney of the Rev. Father Antonio Gonzales, having informed me he had summoned for today the governor of the Indians of Tumacacori to show him the monument of the said town or of the deserted Calabazas, and to postpone the surveys in waiting for his arrival; to which I assented to, and took note of it, which I authorize and sign with the aforesaid adjacent owner, the officials and witnesses of my assistance.

FRANCISCO NAVAMUEL.
MARCELLO BONILLAS.

JOSE GALLEGOS.
Ass't:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

At the said place of Nogales, on the twenty-sixth day of said month and year, Don Marcello Bonillas having informed me that up to that date the governor of Tumacacori had not presented himself, and on that account he had gone out to hunt the boundary monument of Calabazas, which he had found ahead of this place, being the same, described in the title papers of the said Calabazas,

139 which he has along with him, and in this regard that I could proceed with the survey; I ordered the cord to be stretched in the same direction of the north, and there were meas-

ured and counted on the public road forty-five cords, which with the former measurements of the twenty-fourth day of this month, make three hundred and forty, which terminate on the public road, on a low place where opens up a broad gulch that debouches from the foot-hills of the Pajarito mountains; and there I ordered the party (interested) to put a monument, that of Calabazas being about one thousand passes further on, upon a high hill lying ahead of the said gulch. At this place the compass was pointed to find the direction, by which means and having in view the title papers of Calabazas, as well as the information obtained from some persons, I became convinced that here were the limits of the lands of the mission. Having asked the party (interested) to tell me what breadth of land he desired, he answered me that he wanted towards the east twenty cords; accordingly there were measured to him from the monuments situated on the public roads, in a straight line, guided by the compass, twenty-two cords up to a hill at whose base there were many oak trees, and on the top of it was put a heap of stones in sign of monument. Having returned to the same cross-monument on the public road, I set the compass with care and by it I pointed to the West, towards which I went measuring and counting fifty cords, till I reached very broken ground which it was impossible to measure with the cord, on which account, in company with the officials I made a very careful calculation of one hundred and fifty cords, so as to reach where the end of the Pajarito mountains subside towards the North, contiguous to the pass called Calabazas, the said mountains of Pajarito lying inside, athwart, in the surveyed lands, and there I ordered the party to put a heap of stones in sign of a corner monument.

140 So was the northern boundary established with two hundred and twenty-two cords, from the corner monument of the west to the corner of the east, and being joined to lands of the mission. And having returned to the place of beginning the survey, that is the cross-monument of the northern boundary of La Casita, I placed the compass carefully, and I laid the cord towards the east, measuring twenty-two cords, that ended on some hills, on the trunk of an oak tree where was placed a heap of stones. And returning to the same cross-monument I placed the compass carefully, and by it there were measured, and, over some broken ground calculated, towards the west, two hundred cords which ended on a whitish spur of the mountains, covered with much pasture, contiguous to the renowned Planchas de Plata, and which spur divides the waters going towards the ranch of Aguas Calientes and those going to Agua Sarca.

So was established the southern boundary with two hundred and twenty-two cords, joined there with the ranch of La Casita. In this way was finished the survey of the remnant of the public lands, which is composed of seven and one-half sitios, which being made known to the party, he was satisfied and made cognizant of the area it contained, and also advised that at the proper time he must put permanent monuments of stone and mortar.

In witness whereof this was signed by the attorney-in-fact of his

Rev. Father Antonio Gonzales, the officials who know how, and my assistants.

FRANCISCO NAVAMUEL.
MARCELLO BONILLAS.
JOSE GALLEGOS.
FRANCISCO GONZALES.
JOSE ELIAS.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

Forthwith, at the place called La Tinaja, on the northern boundary of the ranch of La Casita, the surveys of the remnant of the public lands having been finished, for which I was commis-
141 sioned by the chief of the treasury of the department, and which were made in favor of Don Jose Elias and Don Francisco Gonzales, I said that I should order and I did order to make appointment of practical, well-advised and conscientious persons to make the appraisement of the land, as is provided by the law of the treasury number 26 of July 11th of 1834, and for that purpose I appointed the representatives of the mission, Don Marcello Bonillas, and the justice of the peace of Ymuris, Don Jose Fraijo, gentlemen, who, besides the qualities demanded by the law, they join the circumstance of being practically acquainted with the land to be appraised.

In witness whereof I signed it with the assisting witnesses according to law.

FRANCISCO NEVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
——— ———.

Subsequently I made known to the said citizens, Marcello Bonillas and Jose Fraijo, their appointment for the appraisement of the seven and one-half sitios for raising cattle and horses, included in the remnant of the public lands surveyed in favor of Don Jose Elias and Francisco Gonzales; who, having accepted, I put them under oath by God and the sign of the cross, whereby they offered to well and faithfully discharge their duty and they signed it with me and the assistant witnesses, according to law.

FRANCISCO NAVAMUEL.
MARCELLO BONILLAS.
JOSE FRAIJO.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

Forthwith the said citizens Marcello Bonillas and Jose Fraijo presented themselves saying, that after consulting together and being well posted as to what is provided in section 4th, articles 64 and 65 of the organic law of the treasury, they would value, and in
142 fact they did appraise the seven and a half sitios of land for raising cattle, at the rate of fifteen dollars, on account of being all dry and could only be used as pasture lands for cattle, the total for the said seven and a half sitios, amounting to one hundred and twelve dollars and fifty cents; and I being satisfied with the appraisement, they signed it with me and the witnesses of my assistance.

FRANCISCO NAVAMUEL.
MARCELLO BONILLAS.
JOSE FRAIJO.

Assistant:
JOSE L. GALLEGOS.

In the town of Magdalena on the fifteenth day of the month of November of one thousand eight hundred and forty one, the appraisement being finished for the sitios surveyed in favor of Don Jose Elias and Don Francisco Gonzales, I said that it should be ordered and I did order that they should be put up at public auction for thirty consecutive days at the town of Ymuris, as is provided in article 75, section 7th, of the organic law, in quest of bidders who may raise the price, for which purpose there shall be also posted notices in public places, and any bids made shall be received. And by these presents, I, the judge commissioner, so commanded it and signed it with the assistant witnesses, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

First Auction.

YMURIS, *November 11th of* 1841.

The remnant of the public lands between the northern boundary of the ranch of La Casita and that of the western limits of the mission of Tumacacori and Calabazas, composed of seven and one-half sitios of land, surveyed in favor of Don Jose Elias and Don
143 Francisco Gonzales, have been appraised in one hundred and twelve dollars and fifty cents. If any person wants to make a better bid let him apply to the survey commissioner and it will be received, for which purpose is made this first publication, which I certify.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

2d Auction.

At the town of Ymuris, on the 12th day November of 1841.

The remnant of the public lands situated between the northern boundary of the ranch of La Casita and the western (boundary) of the ranch of the mission of Tumacacori and Calabazas, which consist of seven and a half sitios for cattle, surveyed in favor of Don Jose Elias and Francisco Gonzales, appraised in one hundred and twelve dollars and fifty cents. If any person wants to better the price let him apply to the commissioner of survey and it will be received, for which purpose this publication is made, which I certify with the witnesses of my assistance according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

3d Auction.

YMURIS, *November 13th*, 1841.

On this day the third auction was held in the same terms as the former ones, in which no bidder appeared to better the price. I certify according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

4th Auction.

YMURIS, *November 14th*, 1841.

On this day the fourth auction was held in the same terms as the foregoing, no person presenting himself to better the price.
144 I certify with the witnesses of my assistance according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

5th Auction.

YMURIS, *November 15th of* 1841.

On this day the fifth auction was held in the same terms as the former ones, no person having presented himself to better the bid.

In witness whereof I sign it, with witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

6th Auction.

YMURIS, *November* 16*th of* 1841.

On this day the same auction was held as the former ones, no bidder appearing to better the price.

In witness thereof I sign it, with the witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

7th Auction.

YMURIS, *November* 17*th of* 1841.

On this day was held the same auction and in the same terms as the former ones, no bidder appearing to better the price.

And in witness thereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

8th Auction.

YMURIS, *November*, 1841, *Date* 18*th.*

On this day the same auction was held on the same terms as the former ones, no bidder appearing to better the price.

In witness whereof I signed it, with the witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

145 Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

9th Auction.

YMURIS, *November* 19*th of* 1841.

On this day the same auction was held as the previous ones, no bidder appearing to better the price.

In witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

10th Auction.

YMURIS, *November* 20*th of* 1841.

Consecutively on this day has been held the same auction in the same terms as the former ones, no better bidder appearing.

In witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

11th Auction.

YMURIS, *November* 21*st of* 1841.

On this day the same auction was held on the same terms as the former ones, no better bidder appearing.

In witness whereof I signed this, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistants:
SIMON MARIN.
Assistants:
JOSE L. GALLEGOS.

12th Auction.

YMURIS, *November* 22*d of* 1841.

On this day the same auction was held on the same terms as the former ones, no better bidder appearing.

In witness whereof I signed this, with my assistants, according to law.

FRANCISCO NAVAMUEL.

146 Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

12th Auction.

YMURIS, *November 22d of* 1841.

On this day the same auction was held on the same terms as the former ones, no better bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

13th Auction.

YMURIS, *November 23d of* 1841.

On this day also the auction was held on the same terms as the former ones, no better bidder presenting himself.

In witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

14th Auction.

YMURIS, *November 24th of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

In witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

15th Auction.

YMURIS, *25th of November of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

In witness whereof I signed it, with my assistants, accord-
147 ing to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

16*th Auction.*

YMURIS, *November* 26*th of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

17*th Auction.*

YMURIS, *November* 27*th of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

18*th Auction.*

YMURIS, *November* 28*th of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

19*th Auction.*

YMURIS, 29*th of November of* 1841.

On this day the same auction was equally held as the former ones, no better bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

148 Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

20th Auction.

YMURIS, *November 30th of* 1841.

On this day the same auction was held on the same terms as the former ones, no bidder having appeared.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

21st Auction.

DECEMBER 1ST OF 1841.

On this day the same auction was equally held as the former ones, no bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

22d Auction.

YMURIS, *December 2d of* 1841.

On this day the same auction was equally held as the former ones, no bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

23d Auction.

YMURIS, *3d of* 1841 (*December*).

On this day the same auction was equally held as the former ones, no bidder appearing.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

149 *24th Auction.*

YMURIS, *4th of December of* 1841.

On this day the same auction was equally held as the former ones, no bidder appearing.

And in witness thereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

25th Auction.

YMURIS, *December 5th of* 1841.

On this day the same auction as the former ones was held, no bidder appearing.

And in witness whereof I signed, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

26th Auction.

YMURIS, *December 6th of* 1841.

With all the formalities of law, on this day the same auction as the former ones was held.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

27th Auction.

YMURIS, *7th of December of* 1841.

With the formalities of law, on this day the same auction as the former ones was held.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

28th Auction.

YMURIS, *December 8th of* 1841.

On this day the same auction was equally held as the former ones, no bidder appearing.

And in witness whereof I signed, it with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

29th Auction.

YMURIS, *December 9th of* 1841.

With all the formalities of law, on this day the same auction was held as the preceding ones.

And in witness whereof I signed it, with my assistants, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

30th Auction.

YMURIS, *December 10th of* 1841.

The remnants of the public lands between the northern boundary of the ranch of La Casita and the western (boundary) of the mission of Tumacacori and Calabazas, which comprise seven and one-half sitios for cattle, surveyed in favor of Don Jose Elias and Don Francisco Gonzales, appraised at one hundred and twelve dollars and fifty cents. If any person desires to better the bid, let him apply to the survey commissioner and his bid will be admitted, for which purpose this last offer is made.

And in witness whereof I signed it, with the witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

No bidder having presented himself until now and these proceedings of survey being concluded, I, the judge commissioner, said that they be sent to the chief of the treasury, summoning the interested parties to the capital of Ures, to appear in person or by attor-

neys instructed and feed, to attend the sale at public auction
151 of the surveyed lands that will take place.

And by these presents I so provided, ordered, and signed, with the witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

Assistant:
SIMON MARIN.
Assistant:
JOSE L. GALLEGOS.

In the town of Magdalena, on the twenty-fourth of said month and year, Don Jose Elias having been summoned as the attorney of his parents, Don Francisco Gonzales, that he should appear at the treasury of the department, I was informed he was absent, on which account I ordered the suspension of the remittance of this expediente until he may be made acquainted with the foregoing decree; and in witness whereof I signed it, with the witnesses of my assistance, according to law.

FRANCISCO NAVAMUEL.

Assistant:
LORETO ELIAS.
Assistant:
MARIANO BONJEL.

In the aforesaid town, on the second day of the month of August of one thousand eight hundred and forty-two, Don Jose Elias having returned from the places where he was, I summoned him before me to notify him of the preceding order of the 13th of December last, and, informed of the whole thereof, he said that he would appear in person or by attorney at the treasury of the department with the object indicated to him. This he said, and he signed it with me and my assistants.

FRANCISCO NAVAMUEL.

Assistant:
LORETO ELIAS.
Assistant:
JOSE MARIA BONJEL.

ANNOTATION.—On fifteen legal leaves this expediente was forwarded to the hon. treasurer of the department today, August 16th.

In witness whereof I put my scrawl.

FRANCISCO NAVAMUEL.

152 Commission of surveys:

I have the honor to forward to you the enclosed expediente which begins with a writing of Don Jose Elias, and some proceedings executed under the extinguished chief treasury, in consequence of which I executed said expediente, and which I was ordered to survey separately, which I also enclose herewith in fifteen legal leaves.

In making this remittance I have the honor to protest my distinguished respects and attentions.

God and liberty.

Magdalena, August 17th of 1842.

FRANCISCO NAVAMUEL.

Hon. treasurer of the department, Ygnacio Santos Elias.

URES, *September 7th of* 1842.

MY DEAR SIR: By these presents I confer on you all my power and ample faculty to present yourself at the treasury of the department, and act in my stead and do as I would do, and as attorney for myself and for my stepfather Don Francisco Gonzales joined to my mother Dona Balvanera Redondo, in the proceedings concerning the ranch of La Casita, and the remnant of the public lands joining thereto, which were surveyed in favor of my said stepfather.

Wherefore, I trust you will be present at the three last auctions which will take place of the said public lands, to receive the deed of grant and to pay the proper price, according to the instructions which I gave you separately, having the right, if you wish to do so, to substitute this power.

I am your obedient &c. &c.

JOSE ELIAS.

ARIZPE, *25th of November of* 1842.

Let report be made to the superior board of the treasury of the department, of the foregoing proceedings of survey, appraise-
153 ment and public auction of the remnants of the public lands of the ranch of La Casita, surveyed in favor of Don José Elias and his parents Don Francisco Gonzales and Dona Balvanera Redondo, presenting the expediente separately from that of La Casita, that it may make the disposition it may deem proper, in conformity with the superior orders on the subject. The treasurer of Sonora, so ordered and signed it with the assistant witnesses according to law.

YGNACIO LOPEZ.

Assistant:
ANTONIO F. Y PERALTA.
Assistant:
JOAQUIN URIAS.

ARISPE, *28th of November of* 1842.

In compliance with the resolution of today, of the superior board of the treasury of the department, let the foregoing proceedings mentioned in the preceding decree be forwarded to the fiscal attorney that he may give his opinion on the subject.

LOPEZ.

Hon. treasurer of this department:

Don José Elias for his parents Don Francisco Gonzales and Doña Balvanera Redondo, owners and possessors of the ranch of La Casita, in Pimeria Alta, by petition of May 6th of 1841, applied to the extinguished treasury-in-chief of the department, asking for the resurvey of the said ranch, and the survey of the remnants of the public lands they were in need of, offering the necessary proof of their needs.

The report having been made by the chief (of the treasury) to the superior board of the treasury, of said petition, in accordance with the provisions of the superior order of the 21st of December of 1840, it was decreed by the said board, to resurvey for Don Jose Elias the lands of his property, as petitioned for, and to
154 survey also the remnants of the public lands he prayed for, with all the forms of law, to be put up at auction, making separate expedientes in each case, making due report to said board, as to the resurvey of the first. The treasurer-on-chief, in accordance therewith, on the 26th of said month of May of 1841, issued the proper and sufficient commission with instruction to Don Francisco Navamuel, resident of Magdalena, to carry into effect the two enumerated operations of survey separately.—Navamuel accepted the commission by act of September 1st of the same year, and summoned the interested parties and his reverence, the president and minister of the mission of Pimeria Alta, Rev. Antonio Gonzales, as administrator of the ecclesiastical property of the town of Ymuris, Tumacacori and Calabazas, adjacent to Da Casita, having attended at the surveys, Don Marcelo Bonillas as attorney-in-fact of the said Rev. president, and 2d justice of the peace of Ymuris, Don Jose Fraijo; and having first appointed the officers, counters, chainmen and compassman, whom he swore according to law, on the 21st of October of 1841, the commissioner proceeded in the forms legally established to survey the ranch of La Casita, by which there resulted to be in this property, the same nine sitios that were surveyed and culculated by the original surveyor Don Jose Olave, on April 28th of 1742 with an excess of ten million and two hundred thousand square varas, which are not half a sitio, and even if they were so much as that, even then it should not be held as demacias, in accord with the provisions in the last part of article 2d of the original decree of the old state, No. 51 of May 12th of 1835. So the commissioner Don Francisco Navamuel, with the summoning of Don Jose Elias, concluded the expediente, as appears from the proceedings composing it, of seven legal leaves, the last three
155 on common paper, which must be replaced by the parties with the proper stamp paper, so as to reimburse the treasury, to make the process acceptable.

Then the commissioner started separately a judicial investigation, before the second justice of the peace of Ymuris, of three impartial, conscientious and well-informed witnesses, by which it is proven that the said Francisco Gonzales and his wife Mrs. Balvenera Redondo, are in need of the public lands they have entered with Don

Jose Elias their son, as well as an abundance of cattle with which to occupy them; and having summoned the same parties interested, and the representative of the mission of said town of Ymuris and of Tumacacori, Don Marcelo Bonillas, with the prior appointment of the surveying officials, counter and compassmen, on the days of 24th and 26th of October of 1841, proceeded to survey the remnants of the public lands so surveyed, situated between the northern boundary of the ranch of La Casita and those of the west of the missions of Tumacacori and Calabazas, resulting there three hundred and forty cords from north to south and two hundred and twenty-two cords from east to west, which reduced to varas, and multiplying one by the other, give an area of one hundred and eighty-eight millions and seven hundred thousand square varas, which make seven and one half sitios and two caballerias somewhat short, for raising cattle.

Immediately after the commissioner appointed and swore in due form, Don Marcelo Bonillas and Don Jose Fraijo to appraise the said public lands, and *this* intelligent and practical experts, appraised the seven and a half sitios in one hundred and twelve dollars and fifty cents, at the rate of the legal minimum of fifteen dollars each, being all dry and only good for pasturing cattle; but, as by an involuntary mistake in the computation of the surveyed lands, no count was made of the two short caballerias which they also contain, as I have shown, these have to be appraised at
156 sixty-five and one half cent-, at the same rate of fifteen dollars per sitio; by which the total amount for the said lands should be one hundred and thirteen dollars fifteen and a half cents.

And lastly, the said commissioner having offered at auction the said surveyed public lands, for thirty consecutive days, asking for bidders, without any appear, finished the proceedings on the 13th of December of 1841, summoning Don José Elias and forwarding to the treasury the expediente thereof, on fifteen legal leaves, the process being written on fourteen leaves of common paper, in default of the legal paper, the which fourteen leaves the parties must replace to reimburse the revenue. And, as you have, obeying the supreme order in regard thereto of December 21st. of 1840, brought to the knowledge of the superior board of the treasury of the department and the disposition it has made of the expediente, of the survey of the ranch of La Casita, and that of the survey of the remnant of the public lands, I have just analyzed, being the same so confirmed in everything according to the laws, decrees and regulations touching such matters, I am of the opinion, that you may, having summoned Don Ygnacio Santos Elias, or whoever may act for him, or the representative of Don José Elias and his parents Don Francisco Gonzales and Doña Balvanera Redondo, according to the power on page 17, cause the holding, by the treasury, of the three public auctions of the said seven and a-half sitios and two short caballerias of public lands for raising cattle and horses, contained between the northern boundary of the ranch of La Casita and those of the west of the mission of Tumacacori and Calabazas, in Pimeria Alta, spoken *off* in this expediente, knocking it down to

the highest bidder or bidders who may present themselves, to whom, after paying the proper amounts to the public treasury, for the value of the said lands and six dollars for the last auction, the
157 proper deed of grant be issued for their protection, the dues on which they must also pay to the national exchequer.

This is what I ask in the faithful fulfillment of official duty; but you may, nevertheless, do as you may think most proper and convenient.

Hermosillo, 5th of December of 1842.

JOSÉ MARIA MENDOZA.

ARISPE, *5th of January of* 1842.

(I think it means to say December 5, 1842. 1842 is evidently a mistake of the copyist, S. Ainsa.)

In conformity to the opinion of the fiscal attorney of the treasury expressed in the foregoing report, let the three public auctions in the usual form be held, for the sale of the lands spoken *off* in this expediente; summoning for that purpose the members of the board for such auctions, according to article 73 of the decree of April 17 of 1837, and the second section of article 1st of 7th of December of the same year.

YGNACIO LOPEZ.

First Auction.

In the city of Arispe, on the fifth day of the month of January one thousand eight hundred and forty-three, assembled together on an auction board at the office of the treasury of this department, the honorable treasurer, Don Ygnacio Lopez, as president and the members who compose it, who are, the first alcalde of the city, Don Raimundo Vasquez, the collector of taxes, Don Narciso Gaxiola Herreros, and the second officer of the treasury, Don Alejo Carrillo, who in the absence of the cashier, acts as secretary, (the fiscal attorney, chief of the treasury, Don José Maria Mendoza, being absent on commission of the general government) the said board ordered that, with beating of drums the auction should be called,
158 and in fact it was so called by the crier, Victor Escalante, in a high and clear voice, saying:

"There is going to be auctioned for account of the public treasury of the department, seven and a half sitios and two short caballerios of land for raising cattle and horses, included in the remnants of the public lands, situated between the boundaries of La Casita and those of the mission of Tumacacori and Calabazas, in Pimeria Alta, in favor of Don Jose Elias and his parents, Don Francisco Gonzales and Dona Balvanera Redondo, residents of the town of Ymuris, and appraised in one hundred and thirteen dollars and fifteen and a half cents. Whoever wishes to bid on the said land, let him make formal offer before the board of auction, which will be received as provided by the laws on the subject, with the understanding that by the day after tomorrow, the sale will be ratified in favor of him who makes the highest bid."

And there being no bidder, it was noted down, in testimony whereof this was signed by the president and members of the auction board.

LOPEZ.
VASQUEZ.
G. HERREROS.
ALEJO CARRILLO, *Secretary.*

Second Auction.

In the same city, on the 6th day of the said month and year, this board of auction being assembled, a call was made equal in everything to the anteceding one, with the only difference of saying to the public that at twelve o'clock meridian, the sale will be absolutely made, of the lands concerned in this expediente, in favor of the highest bidder; and there appearing no one, it was noted down; for the due testimony thereof the president and members of the board signed.

LOPEZ.
VASQUEZ.
G. HERREROS.
ALEJO CARRILLO, *Secretary.*

159 *Third Auction and Sale.*

In the city of Arispe on the seventh day of the month of January of one thousand eight hundred and forty-three, assembled as a board of auction at the office of the treasury of the department, the honorable treasurer, Ygnacio Lopez, as president and the members that compose it, who are, the first alcalde of the city. Raimundo Vasquez, the collector of taxes, Narciso G. Herreros, and the second officer of the treasury, Alejo Carrillo, who, in the absence of the cashier, acts as secretary; the fiscal attorney of the treasury, not being present, Jose Maria Mendoza being absent on commission for the general government, the said board ordered that, with beating of drums, a call should be made to the public, as in fact it was done by the crier Victor Escalante, in a high and clear voice, saying:

"There is going to be auctioned off for account of the public treasury of the department, seven and a half sitios and two short caballerios of land for raising cattle and horses, comprised in the remnant of the public lands situated between the boundaries of La Casita and those of the mission of Tumacacori and Calabazas, in the Pimeria Alta, in favor of Don Jose Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, residents of the town of Ymuris, and appraised at one hundred and thirteen dollars and fifteen and a half cents.

Whoever wishes to make a bid on the said land let him apply in due form to this board of auction, which will be accepted according to the laws on the subject; with the understanding that just now the auction and sale will be made in favor of the highest bidder."

At this jointure, Don Ygnacio Santos Elias presented himself in

the name of his principals Don Jose Elias and his parents Don Francisco Gonzales and Doña Balvanera Redondo, offering again for his principals one hundred and thirteen dollars and fifteen
160 and a half cent-, in which the land had been appraised; and the midday hour of twelve having sounded, for the last time the crier said, "Going once, going twice, going thrice; going, going, going; good, good, good to the interest of Don Jose Elias and his parents Don Francisco Gonzales and Doña Balvanera Redondo."

On such terms was this sale executed; the seven and a half sitios and two short caballerias of land for cattle and horses comprising the remnants of the public lands between the boundaries of La Casita and the mission of Tumacacori and Calabazas, in Pimeria Alta, in the jurisdiction of Ymuris, being publicly and solemnly sold for one hundred and thirteen dollars and fifteen and a half cents, for which they were appraised, and in due testimony thereof this proceeding was closed and signed by the president and the members of the board of auction and the said attorney-in-fact, Don Ygnacio Santos Elias.

YGNACIO LOPEZ.
RAIMUNDO VASQUEZ.
NARCISO G. HERREROS.
ALEJO CARRILLO, *Secretary.*

YGNACIO SANTOS ELIAS.

ARISPE, *7th of January*, 1843.

The sale being concluded, of the seven and a half sitios and two short caballerias of land concerned in these proceedings, let it be made known to Don Ygnacio Santos Elias, the attorney-in-fact of Don José Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, so that he may pay into this treasury the one hundred and thirteen dollars and fifteen and a half cents, for which the said land was sold, all in accordance with the orders of the superior board of the treasury in session of August 31st of 1842, and of the disposition of his excellency the inspector commander
161 general of the treasury office in the department by the order of December 2d of said year; joining to the expediente the certificate of said payment in the accustomed form; and which having been done, let title be issued for the same for their protection.

It was so ordered and signed by the treasurer of Sonora, with assistant witnesses, according to law.

Y. LOPEZ.

Assistant:
ANTONIO T. DE PERALTA.
Assistant:
FRANCISCO S. CARRILLO.

On the same day Don Ygnacio Santos Elias, being present, the attorney-in-fact of Don Jose Elias and of his parents Don Francisco Gonzales and Doña Balvanera Redondo, he was notified and informed of the preceding order, and well instructed, said; that he

heard it and that he is ready forthwith to pay the amount specified.

This he answered and he signed with me and the witnesses of my assistance, according to law.

YGNACIO LOPEZ.
YGNACIO SANTOS ELIAS.

Assistant:
ANTONIO T. Y PERALTA.
Assistant:
FRANCISCO S. CARRILLO.

Ygnacio Lopez, captain of cavalry, retired for infantry, in the army, and treasurer of the department of Sonora, I certify, that on page 4 of the provisional book of charges of the current year, appears entered the following entry:

Jan'y 7th.—Charges for clear products of taxes of the department, $—, one hundred and thirteen dollars and fifteen and a half cents, which, in the name and as the attorney-in-fact of Don Jose Elias and his parents Don Francisco Gonzales and Dona Balvanera Redondo, was paid today by Don Ygnacio Santos Elias, as the price of seven and one-half sitios and two caballerias, short, of land for raising cattle and horses, contained in the remnants of the public land found between the boundaries of La Casita and the mission
162 of Tumacacori and Calabazas, in the Pimeria Alta, knocked down at public auction to Don Jose Elias and to his parents Don Francisco Gonzales and Dona Balvanera Redondo, residents of the town of Ymuris.

From this present entry were made the proper certificates for the purpose set forth by the superior order alluded to on page 2 under number 2.

Lopez—Villaescusa, cashier—Ygnacio Santos Elias, $113.15½.

In witness whereof I give the present at Arispe on the 7th of January of one thousand eight hundred and forty-three.

YGNACIO LOPEZ.

On such terms was concluded the present expediente with all the requisites and formalities provided by the laws, regulations and superior dispositions on the subject; said original expediente remaining in the custody of the archives of titles of the treasury of this department as a perpetual muniment of title.

Wherefore, using the faculties vested in me by the laws, regulations, and superior rules on the subject; for the president, and in the name of the Mexican nation, I make grant in due form of law, of seven and one-half sitios and two caballerias, short, of lands for the raising of cattle and horses, contained in the remnant of the public lands situated between the boundaries of La Casita and those of the mission of Tumacacori and Calabazas, in the Pimeria Alta, in the district of San Ygnacio, in favor of Don Jose Elias and his parents Don Francisco Gonzales and Dona Balvanera Redondo, residents of the town of Ymuris, of the same district, to whom I grant,

give and adjudicate said lands, by the way of sale, and with
163 the qualities, firmness and stability established by the laws, for themselves their children and heirs and successors, with all the rights of entry and egress, uses, customs, servitudes, timber, grasses, mountains, pastures, waters, springs, pools, and the rest that belongs to them or may belong to them legally; with the precise and exact condition that they keep occupied and settled said lands, without abandoning, deserting or leaving them for any time, with the understanding that if the entire abandonment should take place for the term of three consecutive years, and there should be any person who should petition for them, in such a case, the fact being first proven, and the (lands) are declared abandoned, they will be granted again to the highest bidder, excepting as it is just, those cases in which the abandonment be on account of the notorious invasion of enemies, and only for the period of such happenings; admonishing, as it is strictly recommended to Don José and his parents Don Francisco Gonzales and Dona Balvanera Redondo, and their children, heirs and successors, that they must confine themselves to the boundaries of the land, marked in the foregoing proceedings of survey; observing and exactly fulfilling the provisions of article 6th of the organic law of the treasury, number 26 of 11th of July of 1834, which imposes on them the obligation to keep on their boundaries monuments of stone and mortar, under the penalties of twenty-five dollars, which will be exacted of them in case of nonperformance, by the proper local judge, for the common council's benefit, the said monuments to be then constructed at the expense of the interested parties.

And with the same power granted to me by the laws, I order and command the local judges, courts and authorities of the present, and those that shall be hereafter of the district of San Ygnacio, that with due regard for the good and prompt administration of justice, and in obedience to the laws on the subject, that they do not per-
164 mit that the said interested parties, Don Jose Elias and his parents Don Francisco Gonzales and Doña Balvanera Redondo, nor their heirs and successors, be in any way disturbed, disquieted or molested, in the free use, enjoyment, property, dominion and possession of the enumerated seven sitios and a half and two caballerias, short, of land composing the remnants of the public lands situated between the boundaries of La Casita and those of the mission of Tumacacori and Calabazas; on the contrary, let them guard and take care constantly with the greatest vigilance and care that they be protected and sustained always in the quiet and peaceful possession to which they are entitled in law; so that in this manner they may enjoy, possess, sell, exchange, bargain for, donate, transfer, grant and mortgage the said seven and a half sitios and two caballerias, short, of land at their free will, as owners, absolute and simple, of said lands.

On which terms I issued the present title of grant in favor of the said Don Jose Elias and his parents Don Francisco Gonzales and his wife Dona Balvanera Redondo and their children, heirs and successors, delivering to their attorney-in-fact, Don Ygnacio Santos

Elias (the title deeds) so that he may put them in the hands of said Don Jose Elias, as an interested party, and as representatives of his parents, for their proper safety, having first taken note (of this title) in the proper book.

Given in the city of Arispe, on the seventh day of the month of January of one thousand eight hundred and forty-three.

Authorized and signed by me, and sealed with the seal of the general commissariat, which is used legally by the treasury of the department, before the undersigned witnesses of my assistance, in default of clerk, which there is not, according to law.

(NOTE BY TRANSLATOR.—The errata is left out, as it has no
165 place here.—S. A.)

[SEAL.] YGNACIO LOPEZ.

Ass.: ANTONIO TERAN Y PERALTA.
Ass.: JOAQUIN URIAS.

A memorandum of the present titled issued is made on page 64 of the proper book that is kept in this departmental treasury.

In witness whereof I put my scrawl—scrawl.

[Seal secretary of fomento.]

By the superior order of this date by virtue of article 3d of the law of December 3d of 1855, the grant of this title was approved issued on the 7th of January of 1843, being therefore legally confirmed.

In witness thereof, and that it may produce the effects that correspond to it this entry is made at the office of the secretary of public work (fomento,) in Mexico on the seventh of July, of one thousand eight hundred and eighty-six.

M. FERNANDES,
Chief Clerk.

Ygnacio Lopez, captain of cavalry, retired from the infantry army, and treasurer of Sonora, I certify, that on page 5 of the provisional journal of the present year, is found the following entry:

January 7th.—Charges of the clear product of the revenue of the department. Thirty dollars, which, in the name and as the representative of Don Jose Elias, the parent of this, Don Francisco Gonzales and Dona Balvanera Redondo, is the sum paid into
166 this treasury by Don Ygnacio Santos Elias, as the price of the title of grant issued in favor of the first-mentioned persons, for seven and one-half sitios and two caballerias, short, of land for raising cattle and horses, of the remnants of the public lands found between the boundaries of La Casita and those of the mission of Tumacacori and Calabazas, in Pimeria Alta; issuing the proper certificate of the present payment, as is provided in the order already mentioned on page 2 under number 2,—$30.00.

LOPEZ YGNACIO SANTOS ELIAS.

In witness whereof I give the present at Arispe on January the seventh of one thousand eight hundred and forty-three.

YGNACIO LOPEZ.

(Endorsements:) Case No. 29. U. S. *vs.* Santiago Ainsa, adm., *ect., et als.* Translation of expediente of Los Nogales de Elias grant. Filed in the office of the clerk court of private land claims December 12th, 1893. Jas. H. Reeder, clerk, by R. L. Long, deputy.

167 (Seal year of 1886.)

Authenticated copy of the expediente of denouncement of the overplus of the rancho called "Los Nogales de Elias," made by Citizen Jose Camou, Jr., coproprietor of said ranch.

(Necessary revenue stamps duly cancelled.)

Citizen district judge:

I, Jose Camou, Jr., a Mexican citizen, merchant, and resident of this place, in due form of law and reserving the right to protest at the proper time, state to you—

That I am the owner of the half of the ranch known by the name of "Los Nogales de Elias," situated on the boundary line of Mexico and the United States of America, between the ranches "La Casita," "Tumacacori," and "Calabasas," within the limits of the district of Magdalena, in this State, (which overplus) I denounce under the right which, as proprietor, art. 8 of the general law of 22nd of July, 1863, concedes me, that there may be adjudicated to me with
168 absolute right of property, after proper legal proceedings, with the understanding that if the other coproprietors of said ranch of Nogales desire to share in this overplus I do not object that the adjudication be made in favor of all the owners thereof in the proportion to which they are entitled, provided they contribute to the expenses of the same until the proper title in fee be obtained.

Therefore I pray and beseech you, citizen judge, to be pleased to admit this denouncement and to appoint at once the surveyor you may see fit to make the survey of the land denounced.

I protest good faith.

Hermosillo, Aug. 11th, 1882.

JOSE CAMOU, JR.

I also state that I also request that the court be pleased in the proceedings on this denouncement to recognize Mr. Juan P. M. Camou as my general agent in this port. Date *ut supra.*

JOSE CAMOU, JR.

Presented the 12th of the month of the date thereof.

Attest. [Rubric.]

169 GUAYMAS, *Aug. 16th*, 1882.

Presented with an accompanying power of attorney; take note thereof as it is general; return it to the party in interest, and afterward the decree will be issued.

The 1st vice-district judge of Sonora decreed and signed it.

P. DEL RINCON.

Witness:
ENRIQUE FONTES.
Witness:
G. RODRIGUEZ.

Thereupon notice of the preceding decree was given to the agent, Citizen Juan P. M. Camou, who, when he understood it, signed it.

J. P. M. CAMOU.

RINCON.

Witness:
ENRIQUE FONTES.
Witness:
G. RODRIGUEZ.

On the same date the undersigned judge certifies that he has seen, read, and returned to the party in interest a full general power of attorney for collections and suits executed in Hermosillo May 4th, 1880, before the notary public, Matias Moran, by Citizen Jose Camou, Jr, in favor of his brother, Juan P. M. Camou.
170 Said power contains all the general clauses proper to those of its kind and the necessary stamps duly cancelled. It was declared sufficient at this port on the 22d of May of the year of its execution by Citizen Licentiate Jesus Maria Gaxiola, which I enter in the proceedings.

RINCON.

Guaymas, Aug. 17th, 1882.

Admit the denouncement to which the foregoing communication refers without prejudice to third parties, who have a better right. Consequently the surveyor, Citizen Florencia Rosas, is appointed, after his acceptance and oath, which he will take before the citizen judge of 1st instance of Magdalena district, to whom commission will be issued for the purpose, with the necessary instructions to proceed, after summoning the owners of adjoining tracts and after examining their titles to the resurvey of the ranch called "Los Nogales de Elias," the overplus of which is applied for, which act he shall perform with the titles of this ranch before him, which the party in interest shall present to him, and shall indicate both in the report of survey and on the maps he shall make in vir-
171 tue thereof the true area of the ranch and the overplus in the same, in case any should result within its monuments, subjecting his operations to the laws of July 20 and Aug 2nd, 1863, and returning the original proceedings that may be had to this court, the agent of the denouncer being cautioned that if within

ninety days, counted from the time the appointed surveyor takes the oath for the discharge of his commission, he does not present the proceedings of survey ordered made this denouncement shall be held as abandoned.

The first vice district judge of Sonora thus decreed and signed.

RINCON.

Witness:
ENRIQUE FONTES.
Witness:
G. RODRIGUEZ.

Thereupon notice of the preceding decree was given to Citizen Juan P. M. Camou, agent of the denouncer, and when he understood it he said that he hears it, and he signed it.

RINCON.
J. P. M. CAMOU.

Witness:
G. RODRIGUEZ.
Witness:
ENRIQUE FONTES.

172 On the same date commission as ordered was issued. Attest.

I, Citizen Pablo del Rincon, acting first vice district judge, make known to you, citizen judge of the first instance of the district of Magdalena—

That a communication presented to this court by Citizen Jose Camou, Jr., denouncing the overplus that may result in the ranch known by the name of "Los Nogales de Elias," situated in the district of Magdalena and near the boundary line of Mexico and the United States of America, between the ranches "La Casita," "Tumacacori," and "Calabasas," the following decree has been made:

GUAYMAS, *Aug.* 17*th*, 1882.

Admit the denouncement to which the preceding decree refers without prejudice to third parties who have a better right. Consequently the surveyor, Citizen Florencio Rosas, is appointed, after his acceptance and oath which he will take before the citizen judge of first instance of Magdalena district, to whom commission will be issued for the purpose, with the necessary instructions to proceed, after summoning the owners of adjoining tracts and after ex-
173 amining their titles, to the resurvey of the ranch called "Los Nogales de Elias," the overplus of which is applied for, which act he shall perform with the titles of this ranch before me, which the party in interest shall present to him and shall indicate both in the report of survey and on the maps he shall make in virtue thereof the true area of the ranch and the overplus in the same, in case any should result within its monuments, subjecting his operations to the laws of July 20 and Aug. 2nd, 1863, and returning the original proceedings that may be had to this court, the agent of the denouncer

being cautioned that if, within ninety days, counted from the time the appointed surveyor takes the oath for the discharge of his commission, he does not present the proceedings of survey ordered made, this denouncement shall be held as abandoned.

The first vice district judge of Sonora thus decreed and signed.

RINCON.

Witness:
ENRIQUE FONTES.
Witness:
RODRIGUEZ.

The communication to which the foregoing decree refers is as follows:

174 Citizen district judge:

I, Jose Camou, Jr., a Mexican citizen, merchant, and resident of this place, in due form of law, and reserving the right to protest at the proper time, state to you—

That I am the owner of the half of the ranch known by the name of "Los Nogales de Elias," situated on the boundary line of Mexico and the United States of America, between the ranches "La Casita," "Tumacacori," and "Calabasas," within the limits of the district of Magdalena, in this State, (which overplus) I denounce under the right which as proprietor art. 8 of the general law of 22nd of July, 1863, concedes me; that they may be adjudicated to me with absolute right of property after legal proceedings, with the understanding that if the other coproprietors of said ranch of Nogales desire to share in this overplus I do not object that the adjudication be made in favor of all the owners thereof in the proportion to which they are entitled, provided they contribute to the expenses of the same until the proper title in fee be obtained.

Therefore I pray and beseech you, citizen judge, to be pleased to admit this denouncement and to appoint at once the sur-
175 veyor you may see fit to make the survey of the land denounced.

I protest good faith.

Hermosillo, Aug. 11th, 1882.

JOSE CAMOU, JR.

And in order that what was ordered by me in my decree herein may be duly complied with, in the name of the justice of the union, I exhort and require you, recommending on my part, that as soon as these presents are received you order them observed and complied with and deliver them to the surveyor appointed for the discharge of the commission entrusted to him.

Given in Guaymas de Zaragoza Aug. 17th, 1882.

P. DEL RINCON.

Witness:
ENRIQUE FONTES.
Witness:
G. RODRIGUEZ.

A seal which reads: Court of first instance of the district of Magdalena.

MAGDALENA, *Sept. 4th*, 1882.

On the date was present Citizen Florencia Rosas before the undersigned, judge of first instance of this district, and when
176 informed of the decree inserted in this commission his appointment as surveyor which the district judge was pleased to make in his favor was made known to him, and when informed thereof said that he accepts and binds himself to comply faithfully with the commission entrusted to him to the best of his knowledge and understanding, signing with me and those of my attendance.

JESUS RUIZ.
FLORENCIO ROSAS.

Witness:
RAF. E. CUEN.
Witness:
A. CAMPBELL.

On the same date and on two folios the present proceedings were delivered to the surveyor, Citizen Florencio Rosas.
Attest. [Rubric.]

MAGDALENA, *Sept. 4th*, 1882.

In compliance with the order of the citizen district judge of the State there were summoned on this date the party in interest, Citizen Jose Camou, Jr., and the owners of adjoining lands, Jose Pierson, Conrado Aguirre, Antonio Campillo, Ana S. de Elias, and Alejandro Clark, the first four for the lands called Sicurisitagui or La Casita, and finally the last one for the lands of Buena Vista, which persons shall present themselves in person or by agent at
177 the place called "Agua Zarca" on the 9th day of the current month to defend by their lawful titles the boundaries of their properties in the survey which will be made on said day and thereafter. The surveyor commissioned for these proceedings thus ordered with attending witnesses.

FLORENCIO ROSAS.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIQUEZ.

At the point and place called "Agua Zarca," on the 9th day of said month and year, the undersigned surveyor-, Messrs. Pascual Camou, Jose Pierson, Conrado Aguirre, Antonio Campillo, and, finally, the attending witnesses, being assembled, the first said—

That he presented the power of attorney lawfully acknowledged by the denouncer, Citizen Jose Camou, Jr., for the purpose of representing his rights to the lands denounced, and also exhibited the titles of the ranch of Los Nogales; the other gentlemen, owners of the ranch of La Casita, also presented the titles of said property; said documents were immediately read, and it was found stated therein that Los Nogales and La Casita have a common boundary on the side

where they adjoin, inasmuch as those (titles) of La Casita
178 state that starting from the point called Sibuta there were measured north four hundred cords of fifty varas each, terminating at an oak tree near a small hillock (on the) San Luis and Guevavi road, from which mark the survey of Los Nogales started according to the letter of the titles to the same. Consequently I stated to the party and to the owners of the adjoining tracts that we would proceed to the place of the oak tree for the purpose of determining the point, landmark of both properties, and to commence the survey, to which they agreed, this decree being placed in the proceedings, which they signed with me and attending witnesses.

CONRADO AGUIRRE.
FLORENCIO ROSAS.
PASCUAL CAMOU.
ANTONIO CAMPILLO.
JOSE PIERSON.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIGUEZ.

Thereupon, being about eleven o'clock in the morning, we proceeded north on the stage road and close to the railroad, and after travelling about three kilometers we arrived at a place where the owners of La Casita stated that their property extended to that
point, more or less, and that time had taken it upon itself
179 to destroy the oak-tree landmark, adding that, in order not to enter into any differences, it would be advisable, in the interest of both parties, to measure the same four hundred cords that the title of La Casita mentions in its measurement north, and where said four hundred cords terminated to build a monument of stone and mortar to serve hereafter as a boundary between said La Casita and Los Nogales, it being agreed that the measurement should begin at the spring at Sibuta, a well-known point, and, as all were satisfied and agreed, we returned to said spring at Sibuta, and on arrival there this minute was reduced to writing that it may appear in the proceeding, which the parties in interest and the attending witnesses signed.

CONRADO AGUIRRE.
FLORENCIO ROSAS.
PASCUAL CAMOU.
ANTONIO CAMPILLO.
JOSE PIERSON.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIGUEZ.

On the following day of said month and year, for the purpose of proceeding to the measurement of the 400 cords mentioned in the

preceding minute, the compass was set up at said spring, and, the magnetic needle being free, the bearing N. 35° 10′ W. was
180 observed, and there were measured on said course with a double dekameter 838 chains or 16,760 meters, equivalent to 400 cords, which terminated at the left edge of the stage road and on the railroad, the monument being placed 65 meters east of said point on the top of the hillock which is at said point, from which there bears directly east a conical peak which they call Santa Barbara, in this manner being determined the boundary which shall hereafter so serve between La Casita and Los Nogales, in accordance with the agreement entered into by the owners of said properties, and, the day having ended, the other proceedings were left pending until the following day; all of which the parties in interest and the attending witnesses signed.

FLORENCIO ROSAS.
CONRADO AGUIRRE.
PASCUAL CAMOU.
ANTONIO CAMPILLO.
JOSE PIERSON.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIQUEZ.

On the following day, being at the monument of La Casita and Los Nogales, at the edge of the road, the bearing east was observed and there were measured 3,986 meters 79 centimeters, which
181 terminated at a stone monument on a small rocky hillock and at its foot passess a valley (cañada), said hillock being the S. E. monument of Los Nogales; thence we return to the said Casita monument and, observing the course N. 66° 50′ W., there were measured 8,524 meters to the point called La Estiladera division of the waters that flow from the ranch of Agua Caliente and Agua Zarca; in said place there was found a monument of stone; which two measured lines constitute the boundary of this tract of land and the ranch La Casita, with which were satisfied the parties owning the adjoining lands and the attending witnesses who signed in evidence thereof.

FLORENCIO ROSAS.
CONRADO AGUIRRE.
PASCUAL CAMOU.
ANTONIO CAMPILLO.
JOSE PIERSON.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIGUEZ.

On the following day of said month and year we, the persons mentioned in the preceding minutes, proceeded to the north cardinal monument of the ranch of Nogales called for in the titles

on the road that goes to Tubac, where a wide valley (canada) opens
out (and today they call it the valley of Juan Antonio), and,
182 having arrived there, the course was observed in the direction of
the pass called Calaveras, and, as the monument mentioned in the titles was not found, there were measured the same two hundred cords or 8,380 meters, which terminated just beyond a broad valley, and on a hillock or ridge was built a monument of stone, this line running S. 78° 45′ W.; having returned to the north cross-monument where this measurement began, the course N. 86° 35′ was observed and there were measured 1,571 meters to a hillock which has many oak trees and on its summit there was found the ancient monument which was renewed, which two measured lines bound the lands of Calabasas; thence in a straight line south there were measured 4,037 meters and 56 centimeters to a small pass formed by a high white hillock (linea?), where a monument of loose stone was placed; thence in a straight line east there were measured 2,290 meters, which terminated on a terraced hillock at the foot of which passes a large valley (canada); thence in a straight line south there were measured 13,458 meters and 6 centimeters to the S. E. monument of the ranch of Nogales or the rocky hillock bounded on this side by public lands, with which was terminated the survey of the lands called Los Nogales, within the measured boundaries of
which are contained 17,882 hectares 55 ares 90 centiares,
183 from which are deducted 13,251 hectares 34 ares and 43 centiares, or 7½ sitios and a fraction, there remain or result as overplus 4,631 hectares 21 ares and 47 centiares. To give a slight idea of the land I will say that in general it is broken, with abundant pastures and timber, among which red oak is plentiful It has no springs, but in its low places water is found at a very little depth. The line of the Sonora railway traverses it through its greatest length to the line between Mexico and the United States, where the said Sonora railway and the Topeka and Santa Fé railway have a station. The land of Nogales has a part within the United States. It is also cut by the line between these two Republics, in accordance with the treaty of Mesilla, at monument No. 26, located on the road to Tucson, at which point there is being formed day by day a noteworthy town.

To close I will say that the needle has a declination of 12° 56′ E. from the astronomical meridian in this latitude; observation made on the 11th of the present month.

Whereupon these proceedings were concluded and signed by the parties in interest and the attending witnesses.

FLORENCIO ROSAS.
CONRADO AGUIRRE.
PASCUAL CAMOU.
ANTONIO CAMPILLO.

Witness:
JUAN JIMENEZ.
Witness:
D. R. RODRIGUEZ.

184 MAGDALENA, *Oct.* 1*st*, 1882.

These proceedings of the survey of the lands called "Los Nogales" being concluded, I forward them to the district court in the State, seven folios and two maps, for approval and filing.

Attest. [Rubric.]

GUAYMAS, *March 4th*, 1884.

These proceedings of survey hereto aggregated having been received, refer the present expediente to the office of the chief of the treasury in the State for information as to whether the public treasury is in possession of the land denounced. The first vice-district judge in the State thus ordered and signed with attending witnesses.

I attest.

P. DEL RINCON.

Witness:
L. A. MORENO.
Witness:
EM. PIÑA.

On the same date Citizen Juan P. M. Camou, when informed of the foregoing decree, said that he hears it and he
185 signed it.

J. P. M. CAMOU.

I attest.

RINCON.

Witness:
L. A. MORENO.
Witness:
EM. PIÑA.

This expediente on twelve folios and the accompanying map is forwarded to the office of the chief of the treasury as is ordered.

Attest. [Rubric.]

A seal that reads: Republic of Mexico, office of the chief of the treasury in Sanora.

Citizen district judge:

As the information found in this office with relation to the affairs of the department of public works does not furnish the necessary data to render with exactness the report asked for, the office under my charge states to you that it does not know whether the public treasury is in possession or not of the lands denounced in the present expediente.

AGAPITO SILVA.

Guaymas, March 31st, 1884.

Received April 4th of said year.
Attest: [Rubric.]

186 GUAYMAS, *April 15th*, 1884.

As it appears from the report from the office of the chief of the treasury that it does not know whether the public treasury is in possession of the overplus of the ranch of Los Nogales, in the district of Magdalena, denounced by Citizen Jose Camou, Jr., informs the denouncer that he must present in this office the titles of said ranch, to make note thereof in this expediente; in the meantime, order the present denouncement published three consecutive times in the official periodical of the State, so that those who believe they have a better right may appear and allege it in this court within thirty days counted from the first publication, in compliance with the provisions of art. 17 of the law of July 22nd, 1863, with the understanding that if not done in the manner indicated said overplus will be adjudicated to the denouncer thereof.

The citizen first vice-district judge in the State decreed and signed it with attending witnesses.

I attest.

P. DEL RINCON.

Witness:
L. A. MORENO.
Witness:
JESUS F. LEYVA.

187 On the same date Citizen Juan P. M. Camou, when informed of the foregoing decree, said that he hears it, and that in regard to the presentation of the titles he will present them opportunely, and signed.

I attest.

RINCON.
J. P. M. CAMOU.

Witness:
L. A. MORENO.
Witness:
JESUS F. LEYVA.

Citizen district judge:

Juan P. M. Camou, in due representation of my brother, Jose Camou, Jr., in the denouncement of the overplus of Nogales, in the jurisdiction of the district of Magdalena, I appear before you and state—

That the proceeding of survey having been made by surveyor that court appointed, I petition you, citizen judge, to be pleased to forward the expediente to the office of the chief of the treasury for the necessary report that the denouncement may continue its ordinary course. It is justice, I protest, with whatever else is necessary, etc.

Guaymas, Feb'y 13th, 1884.

J. P. CAMOU.

Received on its date.
Attest. [Rubric.]

188 GUAYMAS, *March 3rd*, 1884.

Bring forward the denouncement the applicant refers to and order its continuance. The first vice-judge of the district of the State thus ordered and signed with attending witnesses.

I attest.

P. DEL RINCON.

Witness:
L. A. MORENO.
Witness:
E. PIÑA.

On the 4th of said month Juan P. M. Camou, when informed of the preceding decree, said that he hears it and he signed it.

I attest.

RINCON.
J. P. M. CAMOU.

Witness:
L. A. MORENO.
Witness:
E. PIÑA.

Thereupon the edict of which the decree of the 15th of April refers was ordered published three consecutive times in the official periodical of the State as follows:

Edict, by the present: Those who consider themselves with best right to 4,631 hectares 21 ares 47 centi ares of excess which resulted in the ranch of Los Nogales, the boundaries of which are on
189 the north the boundary line of the United States, on the south the ranch La Casita, on the east and west the public lands of the federation, situated in the district of Magdalena, denounced by Citizen José Camou, Jr., are summoned to present themselves and set up their claims in this court within thirty days counted from the first publication of the present edict, which for three consecutive times will be inserted in the official periodical of the State, with the understanding that if they do not do so in the manner indicated, such overplus will be adjudicated to the denouncer thereof, which are entered in this proceeding.

I attest.

RINCON.

Witness:
L. A. MORENO.
Witness:
JESUS F. LEYVA.

A seal which reads: Department of state of the free and sovereign government of Sonora. With your communication of the 24th inst., there was received in this department an edict relating to the denouncement of the overplus of land in the ranch called Los Nogales, situate in the district of Magdalena, made by Citizen José Camou, Jr., which edict has been ordered published in the official periodical of the State as you request. Liberty and constitution.

Hermosillo, April 26th, 1884. V. AGUILAR,
Chief Cl'k.

190 To the district judge of the State Guaymas:

CITIZEN DISTRICT JUDGE: Juan P. M. Camou, in due representation of his brother, Jose Camou, Jr., in the expediente of denouncement of the overplus of the ranch called Los Nogales, in the jurisdiction of Magdalena, appeared before you and stated that in compliance with the decree made in this court on the 15th of April, 1884, I have the honor to enclose herewith the following documents, that note may be taken thereof, and they may be returned to me. The title issued in favor of Don Jose Elias and his parents, Don Francisco Gonzales, and Dona Balvanera Redondo on the 7th of January, 1843; a deed of sale of the one-half of the ranch made in favor of Thomas Robinson, by Jose Elias, on the 10th of December, 1857; an authenticated copy of the testimonio of the deed of sale made by Juan A. Robinson, in favor of Camou brothers, on the 23rd of October, 1871; a certified copy of various documents and of the statement of the judge of first instance of Guaymas, in which it appears that all the properties acquired by Thomas Robinson were bought with the money of his father, Juan A. Robinson, and belonging to the latter, who made the sale to Camou brothers on the 27th of November, 1865; a public document of dissolution of the firm, Camou Brothers, on the 20th of April, 1880, in
191 which it appears that the one-half of the ranch of Nogales is the property of Jose Camou, Jr., the denouncer of the overplus, and besides a certificate of the government of the State, in which it appears that the denouncer is a Mexican citizen; in virtue of which, citizen judge, I request that you be pleased to decree in conformity therewith, as it is justice I claim and whatever else is necessary, etc.

Guaymas, February 10th, 1885.

J. P. CAMOU.

Presented on its date at 12 o'clock of the day.

Attest. [Rubric.]

GUAYMAS, *February 10th*, 1885.

Bring forward the decrees referred to in the preceding communication in accordance with their condition. The proper order will be made. Thus the acting district judge decreed, ordered, and signed with the attending witnesses.

I attest.

J. M. ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

Thereupon the agent of the party in interest, when notified of the foregoing decree, said that he hears it, and he signed.

J. P. M. CAMOU.
ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

192 As requested in the preceding communication and in compliance with the provisions of the decree of April 15th, 1884, take note of the titles and public documents presented by the party in interest, and, this done and no person having appeared alleging a better right to the overplus in question, forward this expediente to the office of the chief of the treasury to make the liquidation of the value of the land at the time of denouncement.

The acting district judge thus decreed, ordered, and signed with attending witnesses.

I attest.

J. M. ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

On the 11th of said month the agent of the party in interest, when notified of the foregoing decree, said that he hears it, and he signed it.

ASTIAZARAN.
J. P. CAMOU.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

Thereupon I make it appear that I have seen, read, and returned to the party in interest the authenticated copy of the title to 7½ short sitios issued in favor of Jose Elias and his parents, Francisco Gonzales and Balvanera Redondo, in the city of Arizpe, by
193 the departmental treasurer of Sonora on the 7th of January, 1843, a deed of sale executed by Jose Elias in favor of Thomas Robinson for the one-half of the ranch of Los Nogales, made in the town of San Ignacio before the first justice of the peace, Ramon Romero, on the 10th of December, 1857; an authenticated copy of the deed of sale of the one-half of 7½ sitios made by Juan A. Robinson before the notary public, Jose Monte Verde, in favor of Camou Brothers, on the 23rd of October, 1871, containing all the legal requisites; a certified copy of various documents and the statement of the judge of first instance of Guaymas, C. M. Campillo, in which it appears that Juan A. Robinson was the lawful owner of the ranch of Los Nogales when he sold to Camou Brothers on the 27th of November, 1865; a public document of the dissolution of the commercial firm of Camou Brothers, acknowledged by the notary public, Citizen Matias Moran, in the city of Hermosillo, on the 20th of April, 1880, in which it appears and is set forth that the owner of the ranch of Los Nogales, Jose Camou, Jr., is a Mexican citizen, and a certificate issued by the governor of the State, Citizen Luis E. Torres, in which it appears that Jose Camou, Jr., is a Mexican by birth, resides in the State, and has never manifested a desire to fol-

low the nationality of his father, which I enter in the proceedings.

194 ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

The undersigned judge states that he has seen published for three consecutive times in the official periodical, "The Constitution," corresponding to the 2nd, 9th, and 16th of May, of last year, the edict which summons whoever believes they have a better right to the aforesaid overplus and does not aggregate to the present expediente any of the said periodicals as not more than the limited number for the clerk of the court is received.

I attest.

J. M. ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

GUAYMAS, *February* 12*th*, 1885.

Forward the present expediente to the office of the chief of the treasury for the liquidation of the value of the land in conformity with the tariff in force at the time of the denouncement. The citizen district judge ordered and signed it with attending witnesses.

I attest.

J. M. ASTIAZARAN.

Witness:
F. CASTILAN.
Witness:
F. SANTILLAN.

On the same date the agent of the party in interest, when
195 notified of the foregoing decree, said that he hears it and *and* he signs it.

ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

Thereupon this expediente is forwarded to the office of the chief of the treasury on 17 folios and the map in compliance with the foregoing decree.

Attest. [Rubric.]

Liquidation which this Office Makes of the Value of the Overplus Denounced and Surveyed in the Present Expediente.

Value of 4,631 hektares 21 ares and 40 centares at the rate of 12 cents per hektare, according to the tariff of '82.. $555 75

which quantity will be entered in the following form:

To the Federal Treasury in cash	$185	25
Do. in bonds	92	625
Do. of the State, cash	185	25
Do. in credits	92	625
Equivalent	$555	75

Guaymas, February 20th, 1885.
The chief of the treasury.

A. RAMOS.

A seal which reads: Republic of Mexico, office of the chief
196 of the treasury in Sonora.

GUAYMAS, *March 5th*, 1885.

Forward this expediente to the chief of the treasury, acting attorney general, so that in compliance with superior orders he will render his opinion before the adjudication is decreed.

The acting district judge so decreed, ordered, and signed with attending witnesses.

I attest.

J. M. ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

On the same date Citizen Juan P. M. Camou, when notified of the foregoing decree, said that he hears it and he signed it.

J. P. CAMOU.

ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

CITIZEN DISTRICT JUDGE: The chief of the treasury, acting as attorney general, says that he has examined the statements of the present expediente of denouncement made by Citizen Jose Camou, Jr., of the overplus of the ranch called Los Nogales de Elias, situated in the district of Magdalena, on the boundary line between Mexico and the United States of America, and has found that the proceed-

ings are correct and in conformity with the provisions of the
197 laws of July 20th and August 2nd, 1863, on the occupation and sale of lands; wherefore the undersigned is of opinion that court should proceed to the adjudication of the land that resulted as overplus from the resurvey of said ranch in favor of the denouncer, Citizen Jose Camou, Jr.

Guaymas, April 4th, 1885.

A. RAMOS.

GUAYMAS, *April 7th*, 1885.

Having examined the present expediente of denouncement of the overplus of the ranch called Los Nogales de Elias, situated on the boundary line between Mexico and the United States, in the district of Magdalena, all of which is in conformity with the general laws of July 22nd and August 2nd, 1863, on the occupation and sale of public lands; having examined the report rendered by the office of the chief of the treasury in the State, from which it appears that he does not know whether the public treasury is in full possession of the land denounced, for which reason the denouncement was ordered published three consecutive times in the official periodical of the State, so that those who believe they had a right to them could appear and allege it before this court; having examined the proceedings spread out on sixteen folios, in which it appears that note was made of various documents, among
198 them a deed of sale executed by Juan A. Robinson before a notary public, Jose Monte Verde, in favor of Camou Brothers, on the 23 of October, 1871, and that it contains all legal requisites; in addition, a certified copy of various documents and the statement of the judge of first instance of Guaymas, Citizen M. Campillo, in which it appears that Juan A. Robinson was the lawful owner of the ranch of Nogales when he sold to Camou Brothers, on the 27th of November, 1865; a certificate made by the governor of the State, Citizen Luis E. Torres, in which it appears that Jose Camou, Jr., is a Mexican by birth and has manifested no desire to follow the nationality of his parents; having examined the proceedings of survey made by the surveyor, Florencio Rosas, from which it appears that the land surveyed has an area of 17,882 hektares 55 ares and 90 centiares, from which deducted 13,251 kektares 34 ares and 43 centiares or $7\frac{1}{2}$ sitios and a fraction there remained or resulted as overplus 4,631 hektares 21 ares and 47 centiares; having examined the other statements of the expediente and taken into consideration that the time indicated in the edicts has passed with excess without any one having appeared to oppose the denouncement of said overplus, in view of what is stated, and in compliance with article- 17, 18, and 19 of said law of July 22,
199 1863, the court decrees:

First. The overplus of the ranch of Los Nogales de Elias, situated in the district of Magdalena, and to the extent of 4,631 hektares 21 ares and 47 centiares is adjudicated, without prejudice to third parties, to Citizen Jose Camou, Jr.

Second. The present adjudication shall have no effect unless ap-

proved by the department of public works, to which an authenticated copy of the expediente and a copy of the map shall be forwarded through the executive of the State.

Third. Delivery of the land and its corresponding titles shall not be made to the party in interest until payment of its value has been made, in conformity with the tariff in force at the time of the denouncement, in the office of the chief of the treasury in the State. The district judge decreed, ordered, and signed it, acting with attending witnesses.

J. M. ASTIAZARAN.

Witness:
J. CASTILAN.
Witness:
F. SANTILLAN.

On the same date this expediente was forwarded to the department of public works through the governor of the State.

Attest. [Rubric.]

A seal which reads: Department of public works, colo-
200 nization, industry, and commerce, Mexico, section I, number 2776.

The testimonio of the expediente formed in that district court on the denouncement made by Citizen Jose Camou, Jr., of the overplus of the ranch which he owns, called Los Nogales, situated in the district of Magdalena, in that State, having been examined by this department and report of the result having been made to the President of the Republic, he has seen fit to direct that I say to you that you be pleased to inform this department why the zone in which the railroad is built was not separated on the ground, and, at the same time, that you be pleased to order the surveyor to state on what basis he estimates all the overplus situated within the Mexican territory, inasmuch as the ranch of Nogales is cut by the boundary line between the two republics.

Liberty and constitution.

Mexico, September 28th, 1885.
201 By order of the secretary.

M. FERNANDEZ, *Chief Clerk.*

To the district judge of the State of Sonora, Guaymas.

CITIZEN DISTRICT JUDGE: I, Juan P. M. Camou, in due representation of my brother, Jose Camou, *in due representation of my brother, Jose Camou,* in the denouncement of the overplus of the ranch of Los Nogales, appear before you.

That in view of the observations which the department of public works has seen fit to make under date of September 28th last I permit myself to say, in order that said court may furnish the report asked of it: When the survey and deed of limitations of said land were made, the separation of the zone on which the railroad is constructed was not thought necessary, because it ought not to be

separated, inasmuch as between said company and the owner there were agreements in accordance with the provisions of law on the concession of the 14th of September, 1880, without prejudice to any one. In regard to the second point of the observation, the court will be pleased to address a note to the surveyor, Florencio Rosas, who resides in La Paz, in Lower California, with the necessary instructions and a copy of the expediente of survey and the accompanying map, that he may state on what basis he estimated all of the overplus situated within Mexican territory, the
202 ranch of Nogales being cut by the boundary line of the United States of the North. In view of the foregoing, I request you to be pleased to decree in conformity with what I have stated in the body of the present communication, as it is justice, I claim, with whatever is necessary, etc.

Guaymas, October 21st, 1885.

J. P. M. CAMOU.

Received on its date at 10 o'clock in the morning.

Attest: MARTINEZ, *Secretary.*

GUAYMAS, *October 21st*, 1885.

Aggregated to the other parts, and, as requested, addressed a communication to the surveyor, Citizen Florencio Rosas, residing in La Paz, Lower California, with insertion of this decree, together with a copy of the map, which shall be at the expense of the party in interest, and note of the observations of the department of public works, dated September 28th last, in order that in view thereof he may give the explanation asked for. When this is done, forward a copy of the new proceedings to said department of public works. Let notice be given. The second vice district judge so decreed and signed.

FRANCISCO J. INGOYEN.

I attest. RAMON MARTINEZ, *Secretary.*

203 On the same date Citizen Juan P. M. Camou, when notified of the foregoing decree, said that he hears it and he signed it.

J. P. M. CAMOU.

I attest.

RAMON MARTINEZ, *Secretary.*

On the 27th of said month the order in the foregoing decree was complied with. The documents were forwarded to the surveyor, Rosas, as ordered.

Attest: MARTINEZ, *Secretary.*

In the denouncement of the overplus of the ranch called Los Nogales made by Citizen Juan M. P. Camou, in representation of his brother, José Camou, I have made the following decree:

Guaymas, October 21st, 1885.—Aggregated to its other parts, and, as requested, addressed a communication to the surveyor, etc., etc.

The communication to which reference is made is the following:

Citizen District Judge Juan P. M. Camou:

In due representation, etc., which I have forwarded to you for your information and use, together with copy of the plan and note of observations from the department of public works referred to.

Liberty and constitution.

Guaymas, October 26th, 1885.

Francisco J. Iregoyen to Surveyor Florencia Rosas, La Paz.

204 Citizen district judge:

In compliance with your decree dated October 21st of last year and in view of the contents thereof, which were forwarded to me and of which I have made careful examination, I have proceeded to comply with the order of the department of public works in its note of observations of the 28th of September of said year. In view of the data furnished, I should say:

First. That the land which forms the ranch called Los Nogales is cut on parallel thirty-one degrees and twenty minutes north in the point- "A," "B," and "C" marked on the plan herewith, and which parallel is the boundary line between the Republics of Mexico and the United States of the North, the point "B" being monument number 26, counting from the Rio Bravo del Norte, a distance from point "C" 15.55 hectometres, and is in its turn 337.09 metres from the point "D."

Second. That the length of said parallel included between the points "A," "B," and "C" mentioned is 9,953.46 metres, and therefore it is confounded with the arc of the great circle drawn between said points with a common azimuth.

Third. That area included or situate within the territory of
205 the United States is, according to my calculations, 3,947 hektares 23 ares and 28 centiares.

Fourth and last That as the total area, which I have calculated on September 12th, 1882, was 17,882 hektares 55 ares 90 centiares, it is clear that within Mexico the ranch of Nogales has 13,935 hektares 32 ares and 62 centiares, resulting in consequence an excess or overplus of 4,631 hektares 21 ares 47 centiares within Mexican territory. The reason is this: The titles of the aforesaid ranch of Nogales show that the Mexican government has been paid for 7½ sitios and 480 square cords, or 13,251 hektares 34 ares and 43 centiares in all. Now, if from this area we segregate the portion situated within the United States, it is clear that the remaining area will be within the Republic of Mexico; but as this is less than that which really resulted from the survey I have made in 1882 it is inferred or follows—that is to say, that the part of the excess should be considered as overplus.

These are, citizen judge, the reasons or premises, according to my understanding, which I have used as a basis for considering within Mexico the overplus I have received, promising whatever may be necessary.

Culiacan, January 15th, 1886.

FLORENCIO ROSAS.

206 Received on the 27th of said January, with the statements referred to, at 10 o'clock in the morning.

Attest: MARTINEZ, *Secretary.*

GUAYMAS, *January 27th*, 1886.

Before the foregoing and preceding having been received aggregate them to the corresponding expediente, and, as provided in the *the* decree made by this court on the 21st of October of last year, make a copy of the new minutes and forward it to the department of public works for its decision.

Thus the district judge decreed, ordered, and signed.

LIC. MONTE VERDE.

I attest.

RAMON MARTINEZ, *Secretary.*

On the same date, Citizen P. M. Camou, when notified of the foregoing decree, said that he hears it, and he signed it.

J. P. M. CAMOU.

RAMON MARTINEZ, *Secretary.*

Thereupon the orders given were complied with.

Attest: MARTINEZ, *Secretary.*

A seal which reads: Department of public works, colonization, industry, and commerce, Mexico.

207 With your communication dated the 1st inst. there was received in this department the certified copy of the proceedings had in the expediente of denouncement made by Citizen Jose Camou, Jr.

Liberty and constitution.

Mexico, February 9th, 1886.

By order of the secretary:

M. FERNANDEZ, *Chief Clerk.*

To the district judge of the State of Sonora, Guaymas.

A seal which reads: Department of public works, colonization, industry, and commerce.

This department having examined the proceedings which the district court transmitted with its official communication of the first of last February and which were had on the report of the denouncement made by Jose Camou, Jr., of the overplus (demasias) in the ranch known as the Los Nogales, situated in the district of Magdalena, in the State, and report of the result having been made to the president, he has been pleased to direct that you be ordered to suspend approval of the adjudication until it becomes known whether or not it prejudices the growing town of Nogales, and likewise until the validity and legality of the title under which it is pretended to hold said ranch is established, substantiation
208 which is so much the more necessary, as there depends upon it not only the proof that there is an overplus (demasias),

but also whether Mr. Camou can sell lands to the railroad company and to those who desire to locate in said town, whose progress encounters an obstacle in the exaggerated pretensions of Mr. Camou, as has been manifested in this department in various communications that have been directed to it, it being a fact that every one doubts the legality of the title alleged by Camou. That in regard to this doubt there is reason to entertain it, inasmuch as in said proceedings of denouncement, when giving the statement of the proceedings, it is stated textually:

"I hereby state that I have seen, read, and returned to the party interested the authenticated copy of the title of ownership of seven and a half square leagues, short, which was issued to Jose Elias Gonzales and Mrs. Balbanera Redondo in the city of Arizpe by the departmental treasurer of Sonora on the 7th of January, 1843," this statement disclosing the fact that the origin of the property or the original title was vicious and null, as the sale was made and the title issued by a departmental treasurer and in the year 1842, when the bases of Tacubaya were in force—that is, when the national government was not only central but dictatorial—which two cir-
209 cumstances give the title in question the character of manifest nullity, since, notwithstanding the law of the 3rd of December, 1855, repealed those of the 25th of November, 1852, and the 7th of July, 1854, it declared, nevertheless, in art. 3 that the alienations of public lands made by the authorities of the departments under the central system without the authorization or consent of the supreme government and by those of the States in contravention of the law of August 18th, 1824, were null and of no value, and that in consequence the holders of that class of lands were liable to the penalties provided for those who acquired property in an illegal and fraudulent manner unless they obtained the approval of said supreme government. On this supposition and it not appearing in the title of Nogales that it was given with the authorization or consent of the government nor likewise that its approval had been obtained, it follows directly that the qualification of null is applicable to it and to the holder the penalties to which under said article he is liable; and if this is so it will be necessary not only to refuse the adjudication of the so-called overplus (demasias), but also to seize the part which is pretended to make pass as private property and to obligate the holder to the i-demnification of the damages he has caused to the public treasury by retaining and using the land
210 that belongs to it, and all this knowingly because the aforesaid laws were duly promulgated, and because, further, the circular of the 4th of October, 1856, called attention to them and warned that holders of this class of lands that if they did not apply for the confirmation of their titles for that reason alone the lands would be considered national lands.

From what has been mentioned, and it is absolutely necessary to clear up the question stated, you will cause the denouncer of this overplus (demasias) to present the title under which he holds said ranch, and, after forwarding it to the district attorney for him to examine into its legality and validity, you will, in view of his opinion

and request, state your own opinion and transmit these proceedings to this department; and, inasmuch as notice of this order has been given to Edward Esparza, commissioner for the revindication of public lands in that State, for the part he may take in the matter in accordance with the powers conferred on him, you will please allow his assistance in the investigation that is made.

Liberty and constitution.

Mexico, March 9th, 1886.

By order of the secretary:

M. FERNANDEZ, *Chief Clerk.*

211 To the district judge of the State of Sonora, Guaymas.

GUAYMAS, *March 20th*, 1886.

Aggregate the communication from the department of public works, dated the 9th inst., to this expediente and show it to the agent of the party in interest, in order that he may comply with what is given therein. When this is done forward the information to the attorney general, as also to Citizen Eduardo Esparsa, commissioned for the revindication of public lands in this State. The district judge thus decreed, ordered, and signed.

LIC. MONTE VERDE.

I attest. RAMON MARTINEZ, *Secretary.*

On the same date J. P. M. Camou, when notified of the foregoing decree, said that he hears it, and that inasmuch as the title to which the decree refers, of which notice is given as in possession of Jose Camou, Jr., the principal of him who replies, and is residing in the city of Hermosillo, it is not possible for him to present it at once, but that he will do so as soon as he receives it, promising to ask for it at the first opportunity, and he signed it.

J. P. M. CAMOU.

I attest. RAMON MARTINEZ, *Secretary.*

212 GUAYMAS, *April 26th*, 1886.

A copy of the title of Nogales de Elias having been received and aggregated in compliance with the foregoing decree, forward the present expediente to the attorney general, and, when returned, present the whole of the proceedings to the revindicator of lands, Eduardo Esparsa. The district judge thus decreed, ordered, and signed.

LIC. MONTE VERDE.

I attest. RAMON MARTINEZ, *Secretary.*

On the same date the agent of the party in interest, Citizen Juan P. M. Camou, when notified of the foregoing decree, said that he hears it, and requests that the number of folios contained in the authenticated copy which he has presented be entered, and he signs it.

J. P. M. CAMOU.

I attest. RAMON MARTINEZ, *Secretary.*

Thereupon the attorney general, when notified of the foregoing decree, said that he hears it and receives the copy and he signed it.

ROBLES.

RAMON MARTINEZ, *Secretary.*

213 On the same date in fifty folios this expediente is forwarded to the attorney general as ordered.

Attest: MARTINEZ, *Secretary.*

Citizen district judge:

The attorney general says that before examining the copy of the title of Los Nogales presented by Mr. Camou it is necessary to make investigation to ascertain whether the acquisition of the overplus denounced does not affect the public interests of the growing and frontier town of Nogales, and also if it is certain that Mr. Camou, with his exaggerated pretensions which he observes with the claimants of lands, is an obstacle to the progress of that town and of the lands of which, as is stated, he is disposing with great advantage without any right to them, especially with respect to the so-called overplus, which has not yet been adjudicated to him. I request this investigation because when the department of public works forwarded me the communication which it addressed to the court on the 9th of last March I am directed to examine the subject and to call forth all that may be necessary, taking into consideration the facts and circumstances above expressed.

Therefore, and as Mr. Eduardo Esparsa is the commissioner of the department of public works and therefore its representa-
214 tive in everything that relates to public lands, I request the court to be pleased to issue a commission inserting this request to the judge of first instance of Magdalena to him personally or to order the local judge of Nogales to make the investigation referred to on the foregoing points and such others as he may consider of importance, and take the necessary steps presenting the witnesses that should testify upon the matter in said investigation.

This being done, I request the court to be pleased to forward me again this expediente to render my opinion and to ask what may be proper.

Guaymas, April 30th, 1886.

ANTONIO ROBLEZ.

GUAYMAS, *May 1st*, 1886.

As the attorney general requested in his foregoing petition, address a commission to the judge of first instance of Magdalena, with the necessary instructions to him personally or to order made by the local judge of Nogales the investigation asked for. Communicate this order to the revindicator of lands in Sonora, Mr. Eduardo Esparsa, informing him likewise of the petition of the attor-
215 ney general. The district judge thus decreed, ordered, and signed. LIC. MONTE VERDE.

I attest.

RAMON MARTINEZ, *Secretary.*

Thereupon the attorney general, when notified of the foregoing decree, said that he hears it and he signed it.

ROBLEZ.

I attest.

RAMON MARTINEZ, *Secretary.*

Thereupon J. P. M. Camou, when notified of the foregoing decree, said that he hears it and he signs it.

J. P. M. CAMOU.

I attest.

RAMON MARTINEZ, *Secretary.*

Thereupon the order in the foregoing decree was complied with.
Attest: MARTINEZ, *Secretary.*

GUAYMAS, *May 12th*, 1886.

The investigation hereto aggregated made by the local judge of Nogales and that which was made at the request of the attorney general having been received, return this expediente to his possession that he may render his opinion and examine into the legality and validity of the title of the ranch called Los Nogales de Elias presented by Jose Camou, Jr.

LIC. MONTE VERDE.

216 I attest.

RAMON MARTINEZ, *Secretary.*

The 20th of said month J. P. M. Camou, when notified of the foregoing decree, said that he hears it and he signs it.

J. P. M. CAMOU.

I attest.

RAMON MARTINEZ, *Secretary.*

On the same day the attorney general, when notified of the foregoing decree, said that he hears it and receives the papers.

ROBLEZ.

I attest.

RAMON MARTINEZ, *Secretary.*

On the 20th of May the title and the proceedings had by the local authorities of Nogales were forwarded to the revindicator of public lands in Sonora.
Attest. [Rubric.]

A seal which reads: Department of public works, colonization, industry, and commerce, Mexico.

Under this date this department states to Citizen Jose Camou, Jr., what follows:

217 The President of the Republic, in view of what you state in your communication of the 24th of last May and of the documents you forwarded with it, has been pleased to direct, in accord-

ance with the prescription which the last part of article 3 of the law of the 3rd of December, 1855, contains, that the adjudication of the public lands which was made by the title issued by the departmental treasurer of Sonora on the 7th of January, 1843, in favor of Jose Elias and his parents, Francisco Gonzales and Balvanera Redondo, should be approved and is approved, which I communicate to you as the result of your said communication, returning to you at the same time the documents relating thereto, which you presented.

Liberty and constitution.

Mexico, July 7th, 1886.

By order of the secretary:

M. FERNANDEZ,
Chief Clerk.

To the district judge of the State of Sonora, Guaymas.

Department of public works, colonization, industry, and commerce of the Republic of Mexico.

Section first, department of public lands, number 1851.

Under this date the following is communicated to the chief of the treasury in this State: The President of the Republic has been pleased to approve the adjudication decreed by the district court
218 of your State in favor of Citizen Jose Camou, Jr., of the overplus of his ranch called Los Nogales de Elias, situated in the district of Magdalena, in that State; consequently the corresponding title has been issued to him, which document is forwarded to you, in order that in conformity with the last rulings of the 18th of February last you may proceed to collect the value of said land and that of the stamps of the paper on which the title is written, and to forward it thereafter to the district court, that in accordance with the provisions of article 10 of the law of July 22, 1863, it may be delivered by said court to the party in interest, and that it may order the corresponding possession given him after verification that the payment has been made in full, of which you will also be careful and give due notice to this department, and I communicate it to you for your information and the uses expressed in the corresponding part.

Liberty and constitution.

Mexico, July 22nd, 1886.

By order of the secretary:

M. FERNANDEZ,
Chief Clerk.

To the district judge of the State of Sonora, Guaymas.

GUAYMAS, *September 9th*, 1886.

The title of the land to which this expediente refers, as also
219 the certificate of the payment of its value, having been received from the office of the chief of the treasury, deliver the former to the party in interest and take his receipt therefor, the lat-

ter being aggregated to this expediente. The district judge so decreed and signed.

LIC. MONTE VERDE.

Attest:

RAMON MARTINEZ, *Secretary.*

On the same date Citizen J. P. M. Camou was notified of the foregoing decree, and when he understood it he said that he hears it, and that he has received the title to which it refers.

After giving the receipt which he delivers and requests an authenticated copy of this whole expediente this he stated and signed.

I attest.

J. P. M. CAMOU.
RAMON MARTINEZ, *Secretary.*

I have received from the district court the title of the overplus of the ranch called Los Nogales de Elias, situated in the district of Magdalena, of this State, the area of said overplus being 4,631 hektares 21 ares 47 centiares, and the value of which is $555.74.

Guaymas, September 9th, 1886.

J. P. M. CAMOU.

220 A seal which reads: Republic of Mexico, office of the chief of the treasury in Sonora, certificate number 57.

The chief of the treasury of the State of Sonora certifies that at folio 43 of the general book of accounts of this office corresponding to the present fiscal year there is an item of the following tenor: To the revenues of the general treasury of federation, $5.97, which, through his agent, Citizen José Camou, Jr., has paid into this office, being the value of the stamps which are affixed to the title which was issued to him for the overplus of his ranch called Los Nogales de Elias, situated in the district of Magdalena, voucher number 59, $5.97, and in witness thereof the present certificate is issued in Guaymas on the 7th of September, 1886.

P., the chief of the treasury, the C. Ramon Martinez.

A seal which reads: Republic of Mexico, office of the chief of the treasury in Sonora, certificate number 56.

The chief of the treasury in the State of Sonora certifies that at folio 42 of the general book of accounts of this office corresponding to the present fiscal year there is an entry of the following tenor:

221 To accounts of receipts number 23, proceeds of the sale of public lands, $555.74, which Citizen José Camou, Jr., has paid into this office by his agent as the value of the overplus of his ranch called Los Nogales de Elias, situated in the district of Magdalena. This payment was made as follows:

To the federation in cash	$185 25
do. in bonds	92 62
To the State in cash & bonds	277 87
	$555 74

A communication relating thereto accompanies it.

Voucher number 58, $555.74.

And in witness thereof the present certificate is issued in Guaymas on the 7th of September, 1886.

P., the chief of the treasury, the C. Ramon Martinez, Guaymas, September 9th, 1886.

As requested, give him an authenticated copy of the whole expediente. The district judge thus decreed and signed.

Attest: LIC. MONTE VERDE,
RAMON MARTINEZ, *Secretary.*

On the same date the party in interest was notified of the foregoing decree, and said that he hears it and signed it.

Attest: J. P. M. CAMOU,
RAMON MARTINEZ, *Secretary.*

222 Taken from the original expediente which exists in this district court, is corrected and compared on 25 folios, with their corresponding stamps duly cancelled, which I authenticate and sign as district judge in Guaymas de Sargosa on the 5th of November, 1886.

Attest: LIC. JOSÉ MONTE VERDE,
RAMON MARTINEZ, *Secretary.*

(Endorsements:) United States *vs.* Santiago Ainsa *et al.*, No. 29. Translation of Demasias of Nogales de Elias Rancho. Filed Dec. 12, 1893. James H. Reeder, clerk, by R. L. Long, dept.

223 Rancho of Los Nogales de Elias.

Certified copy of Toma de Razon. Filed Oct. 28th, 1879.
JOHN WASSON,
U. S. Surveyor Gen'l.

Recorded in Journal, vol. 2, pages 435 & '6, inclusive.

HERMOSILLO, *a dos de Setr.*, 1879.

[SEAL.]

TESORERIA GRAL, }
Del Estado de Sonora. }

El Tesorero Gral, del estado que suscribe, certifico que al folio 64 (vuelta), del Libro de Tomas de Razon, de titulos de terrenos, se encuentra anotada una partida del tenor siguiente:

"En al mismo dia, 7 de Enero, de 1843, se expidio titulo de merced de siete y medio sitios y dos caballerias escasas de tierra para cria de ganado mayor y caballada, comprendidos de los huecos baldios que se hallan situados entre los linderos del Norte del Rancho de la Casita y los del Poniente de la Mision de Tumacacori y Calabazas, en la Pimería alta, partido de San Ignacio, á favor de Dn. José Elias y de sus padres Dn. Franco Gonzales y Da. Balvanera Redondo, vecinos del Pueblo de Imuris, Lopez."

Y á solicitud de los Sres. Camou Hermanos les estiendo el presente, en Hermosillo, á dos de Setiembre, de mil ochocientos setenta y nueve.

I. BERNAL. [RUBRICA.]

HERMO., *Set.* 15, *de* 1879.

[SEAL.]

REPUPLICA MEXICANA,)
Gobierno del Estado de Sonora.)

Jose Tiburcio Otero, vice-gebernador del Estado, certifico que la firma que antecede es la usa en todas sus actos públicos y privados el Co. Ignacio Bernal, tesorero gral. estado.

Y para que obre la fé necessaria donde convenga estiendo
224 el presente, en Hermosillo, a los quince dias del mes de Setiembre, de mil ochocientos setenta y nueve.

JOSE T. OTERO. [RUBRICA.]
I. P. ROBLES.
O. M. [RUBRICA.]

U. S. CONSULATE AT GUAYMAS, MEXICO.

I, the undersigned, consul*ate* of the United States of America for Guaymas, Mexico, and the dependencies thereof, do hereby certify that the seal and signature to the foregoing document is that of Jose Tiburcio Otero, vice-governor of Sonora, and is the same that he uses in all of his official acts as acting governor of the state, being at this time in the full functions of said office under the laws of Mexico.

Given under my hand and the seal of the consulate, at Guaymas, this twentieth day of September, A. D. 1879.

[Seal Consulate of the United States, Guaymas, Mexico.]

A. WILLARD, *Consul.*

Translation of the Foregoing Toma de Razon.

HERMOSILLO, *Sept. 2d,* 1879.

I, the undersigned, treasurer general of the state, certify that on folio 45 of the Book of Tomas de Razon of the titles of lands there is found the following entry:

"On the same day, the 7th of January, 1843, a title of grant was issued for seven and a half square leagues and two caballerias scant of land for stock-raising, including the vacant lands situated between the boundaries of the rancho of La Casita and the western boundary of the mission of Tumacacori and Calabazas, in the Pimeria Alta, district of San Ignacio, in favor of Don Jose Elias and his parents, Don Francisco Gonzales and Dona Balvanera Redondo, residents of the Pueblo of Imuris, Lopez."

And at the request of the Senores Camou Brothers I give
225 this certificate, in Hermosillo, on the 2n- of September, 1879.

I. BERNAL.

I, Jose Tiburcio Otero, vice-governor of the state, certify that the foregoing signature is that which Don Ignacio Bernal, treasurer general of the state, uses in all of his official acts.

"Rancho of Los Nogales de Elias."

——— ———.

OFFICE OF SURVEYOR GENERAL,
TUCSON, ARIZONA, *March 8th*, 1893.

I hereby certify that the (three pages) paper attached hereto is a correct copy of the paper it purports to be a transcript of on file in this office.

ROYAL A. JOHNSON,
[SEAL.] *U. S. Surveyor General, District of Arizona.*

(Endorsed:) Filed in the office of the clerk court of private land claims November 27, 1893. Jas. H. Reeder, clerk, by R. L. Long, deputy.

(Here follows map marked p. 226.)

227 And be it further remembered that on the thirteenth day of December, A. D. 1893, being the third day of the December term, 1893, the argument of said cause not being concluded, the same was continued until the following day, to wit, the fourteenth day of December, A. D. 1893, when the following proceedings were had, to wit:

The counsel in this cause having concluded their arguments the matter was submitted to the court for decision.

Whereupon the court after due deliberation gave judgment as follows, to wit: It is ordered, adjudged and decreed that the defendants or either or any one of them take nothing by their claim of lands lying north of the international boundary line between the United States and Mexico, and that the claims of the various defendants as made in their answers are hereby declared without merit and are disallowed.

Rochester Ford, Esq., counsel for defendants, prayed in open court for an appeal of this case to the Supreme Court of the United States, which prayer was granted by the court.

And be it further remembered that thereafter, to wit, on the 14th day of March, 1894, there was filed in the office of the clerk of said court, at Tucson, Arizona Territory, a petition for review, which petition is in the following words and figures, to wit:

228 United States Court of Private Land Claims, Sitting at Tucson.

NOGALES DE ELIAS.

THE UNITED STATES OF AMERICA
v.
SANTIAGO AINSA, JUAN P. CAMOU, *et al.* } No. 29.

Petition for Review.

Your petitioners present to your honors this their petition for review in the matter of the proceedings had and decree rendered in your honorable court in the case entitled "The United States of America, plaintiff, against Santiago Ainsa, administrator with the will annexed of Frank Ely, deceased; Juan Pierre Camou, Jose Pierson, The New Mexico and Arizona Railroad Company (a corporation), Luisa Romero, Alberto Elias, Enrique Elias, Esperanza Elias, Guadalupe Rothenhausler and her husband, Joseph Rothenhausler, Francisco Elias, Francisco Bedoya, Carmelita Aguire, Antonio Campilla, Victoria Campillo, Anita Padilla and her husband, Ismael Padilla; Carlos Elias, M. Elias, Anito Campillo, Helena Elias, Gilebaldo Elias, and Refugie Elias, defendants," No. 29 on the docket, and your petitioners file this their said petition because they consider themselves aggrieved by errors of law contained in said decree therein rendered, and upon such errors they conceived the judgment of your honors was based.

And your petitioners respectfully show that the said petition herein of the United States purports to have been filed under authority of paragraph 3 of section 8 of the act of March 3, 1891, providing for the organization of this court and defining its jurisdiction, which paragraph provides that when the holder or
229 possessor of any claim of land shall not have voluntarily come in under the provisions of this act the head of the department of justice may, whenever in his opinion the public interest or the rights of any claimant shall require it, file a petition stating in substance that the title of the holder or possessor or the boundaries of the holder or possessor to or of which has not brought the matter into court are open to question and the same was filed within the two years next succeeding the passage of the act, to wit, on August 15, 1892.

That to said petition answers were filed, and to said answers the United States demurred. The cause came on to be heard on said demurrer, and thereafter and after argument had said demurrer was overruled.

That at the December term, 1893, at Tucson, in the Territory of Arizona, said cause being at issue on petition and answer, evidence was taken and a trial had; and thereafter the court has rendered a decision adverse to the grantees and holding that the grant was satisfied with that portion thereof which lies in the State of Sonora, Mexico.

That there appears in the evidence before the court the whole of the titulo, embracing the evidence taken by the surveyor judge

and his report of his survey; that from the evidence it fully appeared that Jose Elias had, in the year 1841, for himself and his parents, Francisco Gonzales and Balvenera Rodendo, purchased of the treasurer general of the department of Sonora, under the laws then in force in Sonora, seven and one-half leagues and two short caballerias of land, embracing the vacant lands between the northern boundary of the Casita rancho and the southwestern boundary of the mission of Tumacacori and Calabasas tract, said tract being known as and called the "Nogales de Elias;" that all of the proceedings required by law in relation to said sale and purchase were strictly complied with and the money paid therefor according to law; from said titulo in evidence it further appears
230 that an order was made for a survey thereof; that the judge, acting surveyor, was required to take testimony as — whether the parties had sufficient personal property to utilize the land, and that testimony was taken, which is set out in the proceedings, showing that the had 4,000 head of horned cattle, etc., and that an order of survey was made containing the fullest instructions in detail. The judge, surveyor, then reported along with the testimony and says that he "began the measurement from the ranch of La Casita on the public road that goes in a northern direction towards the presidio of Tubac, with a cord 50 varas long and counted 295 cords to Los Nogales;" that there he waited for the president to come to point out the lines of the Calabasas, but, he not coming, he obtained information from witnesses as to where the lines were and continued his measurement in the same (northern) direction, and that they went on measuring and counting on the same public road until they had 45 cords, which aggregated the cords necessary, counting 340 cords, that terminated on the same highway in the space where a glen runs out; that it is a wide glen that comes down from the skirts of the Pajarito mountains, and in that place he ordered the claimants to fix their landmarks, leaving that of Calabasas about 1,000 paces further up on the high hill situated in advance of said glen. The surveyor says that he was satisfied that this place was the boundary limits of the mission, and he then measured 22 cords due east for the square and "reached a hill having several green oaks at its foot and on the top a pile of stones was placed instead of a landmark." Returning to the landmark on the highway and setting his compass, he went west, a bee-line measuring 50 cords, until he reached very broken ground, and then estimated 150 cords
231 "until he reached where the Pajarito mountains break towards the north side contiguous to the parties which they call La Calabasas, leaving inside the land measured the said mountains of Pajarito," and that he placed a pile of stones there. He further states that he measured 340 cords from north to south and 322 cords from east to west.

In support of their said petition your petitioners allege and aver that the proof conclusively shows that a survey was made pursuant to the required proceedings for such sale, and that whether this be a grant of all the lands within said boundaries, supposed to be seven and one-half leagues and two short caballerias, or a grant of that

specific quantity within these boundaries, that was a sale and purchase according to the proven survey officially made in pursuance of law; that the same was controlling and binding on the Mexican government and the government of Sonora at the time made; that said survey segregated the land from the public domain and vested an absolute title in Jose Elias and his associates, under which they and their assigns have continued to occupy and possess up to, at the time of, since the session of the territory to the United States.

That if this entire grant could now be dealt with by the United States it might be that in equity the lateral lines should be contracted, *and* it appears perhaps was done in Mexico by virtue of some law passed since the Gadsden purchase, whereby, in derogation of the rights of purchasers under the principles of American law, some resurvey was had, and if sobrante lands were found, then the purchaser or grantee was permitted to buy them at the nominal price of twenty-five cents per acre.

That this land having been purchased in accordance with
232 the terms of the laws then in force and all the requirements thereof having been complied with, including payment of the purchase-money, as shown by the titulo, and the land having been surveyed by legal authority and then segregated prior to the cession, the legal rights of the parties as thus fixed could not be effected, altered, or modified by anything which has happened since the cession of the territory embracing the *locus in quo*, whether by action of the Mexican government, that of Sonora, or that of the United States; but the portion of said grant lying in the territory of Arizona being capable of location on the earth's surface by indisputable natural boundaries, your petitionors had a right to have the same confimed to them in accordance with the Mexican survey in pursuance of the grant of sale and purchase.

That the land which your petitioners are seeking to have confirmed is land located, surveyed, and sold to their grantors before the cession *in* what is now Arizona; and, as has been repeatedly adjudicated, their rights are wholly unaffected by anything done or which has failed to be done since the cession, and, the United States having failed to make good by proof the allegations of its petition, the only question is whether the land in Arizona sold and granted to Jose Elias and his associates can now be located with reasonable certainty on the earth's surface in Arizona according to the survey made "entirely with subjection to the resolution of the superior board of the treasury department and with the provisions of sections 345, 346, and 347 of chapter 9 of the organic treasury laws, No. 26, of July 11, 1834," and whereupon the sale and grant were made, and of this there can be no question, since it calls for natural objects which are susceptible of being readily ascertained and
233 identified, and are unquestionably north of the national line and in the Territory of Arizona.

That whatever Sonora or Mexico may have done or may have omitted to do since the cession of the territory to the United States as to that portion of this grant which is located in the territory not ceded to the United States is wholly immaterial and irrelevant

to this proceeding and is not competent in anywise to effect the same.

The record and testimony in the case disclose the fact that the tract purchased by Jose Elias and his associates was a specific tract of land defined by official survey with boundaries marked by mountains and natural objects both on the north and south; that it extended from the Casito rancho on the south to the southwestern boundary of the mission of Tumacacori and Calabasas tract on the north and contained seven and one-half leagues and two short caballerias, all of which appears by the official survey and the grant.

That by the sale and grant of this specific tract said seven and one-half leagues and two caballerias were severed from the public domain of Mexico and became vested in the grantees in consideration of the payment of the agreed price therefor, whereas by the decree of this honorable court it is held that the purchase by and grant made to said Jose Elias and his associates was a different tract of land, a tract comprising a like quantity, but located in a different section, beyond the limits of the United States, and remote from the boundaries established by the survey and the fixed monuments and natural objects that define the location of the tract purchased by and granted to said Elias and his associates.

That the tract so surveyed and purchased by said Elias and his associates lying in Arizona has been possessed by them and those claiming under them, by virtue of said purchase and
234 & 235 grant, up to the present time, claiming title thereto, and their legal right thereto was vested at the time of the cession of the territory in which it lies to the United States.

That this was not a grant of a specific quantity of land within a certain place, but was a sale and purchase of all the land within certain boundaries at a given price per league, as fully appears by the titulo; that the same was fully paid for at the price fixed by law, the exact amount of the price being ascertained by the survey down to the two caballerias in addition to the seven and one-half leagues; that the survey of the land granted, as embraced within certain fixed and well-known boundaries, was required by law to ascertain the exact quantity for which payment was to be made and to define, mark out, and segregate the quantity granted; that this being done according to and in full compliance with all the provisions of law governing the case, and the money being paid to the satisfaction of the Government and the grant being duly and legally made, covering and including the land now in Arizona, an absolute title vested in the grantees, which was complete and unimpaired at the date of the cession, which the United States are bound by the treaty of cession to respect and fully protect, and it is not competent, as is respectfully submitted, for this court to divest that title and annul the rights acquired thereunder; that even were the court not in error, that this was a grant for quantity within exterior boundaries, containing a greater quantity and sufficient thereof to satisfy the grant within the limits of Mexico, it was not competent for the court to dismiss the petition upon the ground that there is sufficient

quantity within Mexico, commencing at the south boundary of the grant, to satisfy the grant for quantity, and before reaching the boundary line between the United States and Mexico, nor to locate the grant for quantity other than to contract the lateral sides, especially when it was not shown upon the trial that there were any intervening adverse rights.

Wherefore your petitioners pray that this honorable court will vacate, set aside, and annul the decree herein heretofore made and will confirm to the grantees and their legal representatives the land *the land* designated and marked out north of the national line in the Territory of Arizona by said Mexican survey, whereunder the same was purchased by said grantees and granted to them by the legally empowered authorities of Mexico.

GEO. HILL HOWARD,
In Propria Persona.
JUAN P. CAMOU,
Per GEO. HILL HOWARD,
His Attorney, etc.

JEFFRIES & EARLE, *Of Counsel.*

236 And be it further remembered that thereafter, on the 19th day of March, A. D. 1894, there was filed with the clerk of this court, at Tucson, Arizona, an affidavit and motion; which affidavit and motion are in the following words and figures, to wit:

237 In the Court of Private Land Claims.

THE UNITED STATES
vs.
SANTIAGO AINSA, Administrator, etc., *et al.* } Los Nogales de Elias Grant.

Ygnacio Bonillas, of lawful age, being duly sworn, makes oath and says that he is a native of the State of Sonora, Republic of Mexico, and now resides in the city of Magdalena, in said State of Sonora; that he is thirty-six years of age; that he is by profession a mining engineer and surveyor, having studied his profession in the Massachusetts Institute of Technology, Boston, Massachusetts, and has had eleven years' practical experience in surveying in the Territory of Arizona and said State of Sonora.

Affiant states that he is thoroughly familiar with the Spanish language and with the methods and formalities with which grants of land are now made and were formerly made in the said State of Sonora and what is now the Territory of Arizona. Affiant states that during eleven years he has read the original title papers of many such grants, and as an engineer and surveyor has made the survey of four of such Spanish or Mexican grants included within what is now the Territory of Arizona, and has made the survey of as many as fifty of such grants, to the best belief of affiant, in said State of Sonora.

Affiant states that during the month of December, 1893, he made

a survey of the private land claim or grant known as the Los Nogales de Elias for use in the trial of said grant in the court of private land claims; that said survey was begun on December 3, 1893,
and that affiant was continuously engaged in the field in
238 making said survey until the 19th day of said month, and that the field-notes and map of said survey were finished at the earliest day possible thereafter, to wit, on January 10, 1894, and on that day were forwarded to the attorneys for the claimants of said grant, and affiant states that he used all diligence possible in making said survey and field-notes and maps, but that neither one could be completed in time to be used on the trial of the above-entitled cause, involving the said Los Nogales de Elias private land claim, and that affiant was in the field making said survey when said case was tried and decided by this honorable court.

Affiant states that said survey and field-notes and maps and computations from which same were made were carefully and scientifically made by him, and that the same are correct.

Affiant states that the length of a cordel is equal to 137.432 United States linear feet, and that 340 cords are equal to 46,726.88 linear feet.

Affiant states that starting from the North Cruz monument of the La Casita grant, which was established at the South Cruz monument of the Los Nogales de Elias grant, a north and south line, magnetic course, 340 cordels or 46,726.88 feet will reach 3,005.88 feet into American territory, and that the exact distance on such a line from the said South Cruz monument to the international boundary line is 43,721 feet or 318.12 cords.

Affiant further states that the road known as the Tubac road, between the said South Cruz monument and the present town of Nogales, on the international boundary line, is not a straight road, but is a meandering road; that 340 cords measured up or along said meandering Tubac road may not reach to the international boundary line, because said road is not straight, but that 340 cords measured in a straight line north from said South Cruz monument
239 will extend 3,005.88 feet into the American territory, as affiant has herein stated.

Affiant further states that the international boundary monument, which is in the present town of Nogales is almost directly north of a north and south line, magnetic course, from said South Cruz monument, being only 18′ 15″ east of magnetic north, and that the north and south line, magnetic course, starting from said South Cruz monument crosses the international boundary line 233.9 feet west of said international monument.

And further deponent sayeth not.

Y. BONILLAS.

Subscribed and sworn to before me this 15th day of March, A. D. 1894.

SELIM M. FRANKLIN,
Notary Public, Pima Co., A. T.

[SEAL.]

240 In the Court of Private Land Claims.

THE UNITED STATES *vs.* SANTIAGO AINSA, Adm'r, etc., *et al.* } No. 29. Los Nogales de Elias Grant.

Come now defendant Juan Pedro Camou, by his counsel, and defendant Santiago Ainsa, administrator, etc., by his counsel, and move the court to vacate and set aside its judgment and decree herein and grant a rehearing and new trial of this cause for the following reasons:

I. That said judgment and decree are contrary to the law in holding that the grant herein is a grant by quantity and not a grant by the metes and bounds described in the testimonio thereof, and that the court erred in not permitting defendants, if said grant is held to be a grant by quantity, to direct the selection of such quantity.

II. That said judgment and decree are contrary to the undisputed evidence, in this: that the evidence shows that 340 cords are equal to 46,726.88 feet, and that the field-notes in evidence of the surveyor, Frank W. Oury, show that from the south cruz monument of the Los Nogales de Elias grant the distance on a north and south line, magnetic course, to the international boundary line is 650.86 chains, or 42,956.76 feet, and that 340 cords measured from the south cruz monument north on such a line will extend 3,770.12 feet into American territory.

III. That such judgment and decree are contrary to the evidence, in this: that the evidence herein shows that the Tubac road is not a straight road, but that it bends and meanders, and that while 340 cords measured along said meandering road will not reach in the international boundary line, the said distance, viz., 340 cords, measured in a straight line north from said south cruz monument will extend into American territory.

241 IV. That such judgment and decree are not supported by any evidence in this case, for the reason that the testimony of the witness Flipper was that 340 cords up or along the said meandering and crooked Tubac road would not extend to the international boundary line, and it nowhere appears in the evidence in this case that 340 cords in a straight line north from the south cruz monument will stop south of the international boundary line, but it appears, on the contrary, that 340 cords so measured will extend into American territory.

V. That new and material evidence has come to light since the trial of this cause, to wit, the evidence of Ygnacio Bonillas, who made, in the month of December, 1893, a survey of this grant, and that said evidence could not be had in time for the trial of this cause, and that said evidence shows, according to the affidavit of said Bonillas, hereto attached, that he is a skilled surveyor, familiar with the Spanish language, and experienced in the surveys of Spanish grants in the State of Sonora, Mexico, and what is now the Territory of Arizona; that said Bonillas carefully and thoroughly surveyed the said Los Nogales de Elias private land claim or grant,

and that said Bonillas will testify that, starting from the south cruz monument of the said grant a north and south line, magnetic course, 340 cords, or 46,726.88 feet, will reach 3,005.88 feet into American territory, and that the exact distance on such a line from the south cruz monument to the international boundary line is 43,721 feet, or 318.12 cords, and more.

WM. HERRING,
HENRY & FORD,
S. M. FRANKLIN,
Attorneys for Defendants.

Endorsed: Case No. 29. Los Nogales de Elias grant. Motion for rehearing and new trial. Filed in the office of the clerk, court of private land claims, March 19, 1894. Jas. H. Reeder, clerk, by R. L. Long, deputy.

242 And be it remembered that thereafter, on the 14th day of December, A. D. 1893, a stipulation was filed in the office of the clerk; which stipulation is in the figures and words following, to wit:

In the United States Court of Private Land Claims.

UNITED STATES OF AMERICA
vs.
SANTIAGO AINSA *et al.*

It is hereby stipulated that defendants are grantees of and successors in interest to the original grantees under the grant, "Los Nogales de Elias," claimed by them, and that the deeds and conveyances by which defendants and all or any of them deraign title need not be copied in the transcript.

MATT. G. REYNOLDS,
U. S. Attorney.
L. F. PARKER, *Of Counsel.*
GEO. HILL HOWARD,
Pro se and for Def't Camou.
ROCHESTER FORD,
Attorney for Santiago Ainsa et al.

243 And be it further remembered that thereafter, on the 20th day of March, A. D. 1894, there was filed in the office of the clerk of this court, at Tucson, Arizona, a motion; which motion is in the words and figures following:

244 In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA
vs.
SANTIAGO AINSA, Adm'r, etc., *et al.*
No. 29. Los Nogales de Elias Grant.

Come now defendants Santiago Ainsa, Juan Pedro Camou, and The N. M. & A. R. R. Co., by their attorneys, Rochester Ford and

William Herring, and move the court to vacate its order made herein on December 14, 1893, allowing an appeal herein to the Supreme Court of the United States, and for leave to withdraw the notice of and motion for appeal herein.

Dated March 19, 1894.

ROCHESTER FORD,
WILLIAM HERRING,
Attorneys for Defendants.

(Endorsements:) Case No. 29. Los Nogales de Elias grant. Motion. Filed in the office of the clerk, court of private land claims, March 20, 1894. Jas. H. Reeder, clerk, by R. L. Long, deputy.

And be it further remembered that thereafter, to wit, on the 21st day of March, A. D. 1894, being the 7th day of the December term, 1893, of this court, at Tucson, Arizona Territory, the following order was duly made and entered:

245 In the Court of Private Land Claims.

UNITED STATES OF AMERICA *vs.* SANTIAGO AINSA, Adm'r, etc., *et al.* } No. 29. Los Nogales de Elias Land Grant.

The motion made and filed herein on the 20th day of March, 1894, by the attorneys of defendants to vacate the order heretofore made herein allowing an appeal prayed for by defendants from the judgment heretofore entered herein on the 14th day of December, 1893, which motion also embraced an application for leave to withdraw the notice of appeal upon which the order allowing the same was made, having been duly argued by the counsel for the respective parties, and having been duly submitted, and the court having considered the same—

It is hereby ordered that the order allowing the appeal of defendants from the judgment entered herein on the 14th day of December, 1893, be, and the same is hereby, vacated and set aside; and it is further ordered that defendants be, and they hereby are, allowed to withdraw their notice of appeal upon which said order was made, without prejudice, however, to the right of said defendants or either of them to give or file such notice of appeal as they or either of them may be advised or determine to be necessary or proper in the premises.

246 And be it further remembered that thereafter, to wit, on the 29th day of March, A. D. 1894, the same being the twelvth day of the December term, 1893, of the court, the following, among other, proceedings were had, to wit:

UNITED STATES *vs.* SANTIAGO AINSA, Adm., etc., *et als.* } No. 29. Los Nogales de Elias Grant.

The motion of defendants on file herein, praying for a rehearing of this cause, was argued on behalf of defendants by Rochester Ford,

Wm. Herring, and Geo. Hill Howard, Esqs., and on the part of the plaintiff by Wm. Barnes, Esq., of counsel, and the U. S. attorney, after which the matter was submitted to the court and by the court taken under advisement.

And be it remembered that thereafter, to wit, on the 30th day of March, 1894, being the thirteenth day of the December term, 1893, of the court,—

The motion for a rehearing of this cause heretofore submitted was by the court overruled and denied.

And be it further remembered that thereafter, to wit, on the 28th day of May, A. D. 1894, there was filed in the office of the clerk of this court an application for an appeal and an order allowing an appeal to the Supreme Court of the United States; which application and order are in the words and figures following, to wit:

247 In the United States Court of Private Land Claims.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased; Jean Pierre Camou, George Hill Howard, Jose Pierson, The New Mexico & Arizona Railroad Company (a Corporation), Luisa Romero, Alberto Elias, Enrique Elias, Esperanza Elias, Guadalupe Rothenhausler and Her Husband, Joseph Rothenhausler; Francisco Elias, Francisco Bedoya, Carmelita Aguirre, Antonio Campilla, Anita Padilla and Her Husband, Ismael Padilla; Victoria Campilla, Carlos Elias, M. Elias, Anita Campillo, Helina Elias, Gilebaldo Elias, and Refugio Elias, Defendants. } Case No. 29.

Los Nogales de Elias Grant.

Application for an Appeal.

The above-named defendants and appellants, conceiving themselves aggrieved by the final judgment entered on the 14th day of December, A. D. 1893, in the above-entitled action and court against them and in favor of the above-named plaintiff and appellee, and also the order herein made on March 30, 1894, overruling and denying defendants' motion for a rehearing, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM HERRING,
ROCHESTER FORD,
Attorneys for Defendants and Appellants.

And now, to wit, on the 25th day of May, A. D. 1894, the above application having been presented and fully considered, it is ordered that the appeal be allowed as prayed for, and the above-named defendants and appellants are hereby allowed an appeal to the Supreme Court of the United States.

WILBUR F. STONE,
Associate Justice of the Court of Private Land Claims.

(Endorsed:) Case No. 29. U. S. *vs.* Santiago Ainsa, adm., etc., *et als.* Filed in the office of the clerk, court of private land claims, May 28, 1894. Jas. H. Reeder, clerk, by R. L. Long, deputy.

248 And be it further remembered that thereafter, to wit, on the 29th day of May, A. D. 1894, a citation was filed in the office of the clerk; which citation was in the words and figures following, to wit:

249 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased; Jean Pierre Camou, George Hill Howard, Jose Pierson, The New Mexico and Arizona Railroad Company (a Corporation), Luisa Romero, Alberto Elias, Enrique Elias, Esperanza Elias, Guadalupe Rothenhausler and Her Husband, Joseph Rothenhausler; Francisco Elias, Francisco Badoya, Carmelita Aguirre, Antonio Campilla, Anita Padilla and Her Husband, Ismael Padilla; Victoria Campilla, Carlos Elias, M. Elias, Anita Campilla, Helina Elias, Gilebaldo Elias, and Refugio Elias, Defendants and Appellants.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the second Monday of October, eighteen hundred and ninety-four, pursuant to an appeal filed in the clerk's office of the United States court of private land claims, wherein the above-named defendants and appellants are appellants and you, the above-named plaintiff and appellee, are appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 25 day of May, eighteen hundred and ninety-four.

WILLIAM F. STONE,
Associate Justice of the Court of Private Land Claims.

Due and legal service of the within citation acknowledged this 28 day of May, A. D. 1894.

MATT. G. REYNOLDS,
United States Attorney for the Court of Private Land Claims.

[Endorsed:] No. 29. U. S. *vs.* Santiago Ainsa *et als.* Citation and admission of service. Filed in the office of the clerk, court of private land claims, May 29, 1894. Jas. H. Reeder, clerk, by R. L. Long, deputy.

250 In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA
vs.
JUAN PEDRO CAMOU, SANTIAGO AINSA, Administrator, &c., *et al.*

SIR: You are hereby notified that the defendants Juan Pedro Camou, Jean Pierre Camou, Jose Pierson, and other Mexican defendants, also the New Mexico and Arizona Railroad Company, hereby consent to join in the appeal from the decision and judgment of the above-entitled court in the above-entitled cause to the Supreme Court of the United States.

Dated May 14th, 1894.

WILLIAM HERRING,
Attorney for said Defendants.

Rochester Ford, Esq., att'y for Santiago Ainsa, administrator, &c.

[Endorsed:] No. 29. In the U. S. court of private land claims. Los Nogales de Elias grant. Consent of certain defendants to join in appeal. Filed July 13, 1894. James H. Reeder, clerk, by R. L. Long, dep. William Herring, attorney for said defendants.

251 In the Court of Private Land Claims.

UNITED STATES OF AMERICA
vs.
SANTIAGO AINSA, Adm'r, *et al.* } No. 29. Los Nogales de Elias Grant.

Opinion of the Court.

We are clearly of the opinion that under the proceedings the right of the grantee was limited to the specific amount of land mentioned in the proclamation of sale and the grant. The patent or grant is the evidence of his title—that is, it operated to convey to him the only rights which he acquired in the property under the proceedings. It was based upon the sale and the payment by him of the purchase price; and the sale was by its amount a specified quantity or amount of land, and that was what he paid for. It seems to us impossible that his rights could be enlarged beyond the express terms of the sale and grant by the proceedings which preceded the sale. Those proceedings were essential, perhaps, under

the law. They do not, however, constitute the sale, and were merely preliminary to it. The sale occurred when the property was stricken to the petitioner and he paid the purchase price into the treasury. When he paid for the specified quantity of land which was stricken off to him at the sale and accepted a grant or conveyance of the quantity his rights, we think, are necessarily limited to that quantity.

We do not dispute the correctness of the rule laid down in the cases cited by counsel; neither are we in conflict with that rule. The rule undoubtedly is that when a conveyance is by metes and bounds a recital as to the quantity supposed to be contained in the area does not limit the grant, but the grantee takes all within the boundaries. But here the grant is of a specific quantity in-
252 cluded within specific boundaries, and by the express language of the grant the quantity is made the controlling matter of description, and the intent of the granting officer to reserve to the government the excess over the amount granted within the boundaries is as clearly manifested as it could have been made by a reservation in express language.

It was contended, however, that a grant such as we hold this to be is unknown to the Mexican law, and therefore it cannot be presumed that the officers intended to make one of that character. But what was actually effected by the sale and grant is to be determined from the language made use of, and we have no occasion to inquire into the power of the officers to do what they clearly show they did do. It remains to be determined whether the defendants are entitled to a confirmation as to any lands under the grant. It appears from the evidence that a parallelogram 340 cordels and 222 cordels in width, measured from the point designated by the commissioner as the essential point of the survey, would be partly within the Territory of Arizona and partly within the State of Sonora. But upon what principle can it be said that the petitioner acquired title to own the grant to that tract? The grant was specific as to the quantity, but not as to location. The only effect of the proceedings was to designate certain out-boundaries within which the quantity of lands granted was to be located. Of necessity the exact location was to be determined by some subsequent action of the parties. But no such action was ever taken. At the time of the treaty of cession the grant had not been located within the meaning of that instrument, and hence by its express terms it cannot now be recognized as of any validity. It is not such a grant as by the terms of the treaty the United States is bound to recog-
nize and confirm, and that by the terms of the act under
253 which this court is constituted is the test of the rights of the parties.

The petition of the defendants for a review of the judgment heretofore entered will be overruled.

JOSEPH R. REED,
Chief Justice.

Decision rendered March 30, 1894.
Filed Mar. 30, 1894.

254 *Certificate of Clerk.*

UNITED STATES OF AMERICA, }
Territory of Arizona, } ss:

I, James H. Reeder, clerk of the court of private land claims, do hereby certify that the foregoing is a full, true, and correct transcript of the record, proceedings, opinion, judgment, and evidence in the case entitled United States of America, plaintiff, against Santiago Ainsa, administrator, etc., *et als.*, No. 29 (Los Nogales de Elias land grant), except the original title paper, which is not copied herein.

Given under my hand and the seal of said court, at Tucson, Arizona Territory, this fourteenth day of July, A. D. 1894.

[Seal Court of Private Land Claims, Tucson, Arizona.]

JAMES H. REEDER, *Clerk,*
By R. L. LONG, *Deputy Clerk.*

255 United States Court of Private Land Claims.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator, etc., *et al.*, Defendants.
} No. 29. Los Nogales de Elias Grant.

It is stipulated and agreed that the certified copy appearing in the transcript of the treasurer general of the State of Sonora (being the original certificate made by him) of the contents of the entry in the book of Toma de Razon relating to the Los Nogales de Elias grant and the translation of such entry were offered in evidence at the trial of this cause on the part of defendants.

MATT. G. REYNOLDS,
U. S. Attorney.
ROCHESTER FORD,
Attorney for Defendants.

Filed in the office of the clerk, court of private land claims, July 18, 1894.

[Seal Court of Private Land Claims, Tucson, Arizona.]

JAS. H. REEDER, *Clerk,*
By R. L. LONG, *Deputy.*

[Endorsed:] No. 29. Court of private land claims. United States of America, plaintiff, *vs.* Santiago Ainsa, administrator, etc., *et al.*, defendants. Los Nogales de Elias grant. Stipulation.

256 In the Court of Private Land Claims.

THE UNITED STATES OF AMERICA *vs.* SANTIAGO AINSA, Adm'r, etc., *et al.* } No. 29. Los Nogales de Elias Grant.

Stipulation.

It is hereby stipulated and agreed on the part of The United States, appellee, and on the part of all defendants, appellants, that the original map, made by F. W. Oury, Esq., of the Los Nogales de Elias private land claim or grant, which map was introduced in evidence in the trial of this cause, as per stipulation to that effect, and was filed in said cause December 12, 1893, shall be incorporated and filed with the transcript and record on appeal herein to the Supreme Court of the United States, and the clerk of this court in making out such transcript and record is directed to insert said original map in same upon a blue-print copy thereof being filed with him.

MATT. G. REYNOLDS,
U. S. Attorney.
ROCHESTER FORD,
HENEY & FORD,
Attorneys for Defendants Camou and N. M. & A. R. R. Co.
ROCHESTER FORD,
S. M. FRANKLIN,
Attorneys for Defendant Ainsa, Administrator.

Filed in the office of the clerk, court of private land claims, July 18, 1894.

[Seal Court of Private Land Claims, Tucson, Arizona.]

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy.*

[Endorsed:] No. 29. Court of private land claims. United States *vs.* S. Ainsa, adm'r, etc., *et al.* Los Nogales de Elias grant. Stipulation.

Endorsed on cover: Case No. 15,657. Court of private land claims. Term No., 773. Santiago Ainsa, administrator, with the will annexed, of Frank Ely, deceased, *et al.*, appellants, *vs.* The United States. Filed August 6th, 1894.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE UNITED STATES OF AMERICA, Respondent,
versus
SANTIAGO AINSA, Administrator, *et al.*, Appellants.

Los Nogales de Elias Grant.

Stipulation.

It is hereby stipulated and agreed between the parties hereto that upon the trial of this cause in the court below it was admitted as a fact that the original matrix or expediente of the proceedings upon which the titulo introduced in evidence by appellants was based is not to be found among the archives at the proper depository at Hermosillo, and it was further shown by the testimony that the original archives containing such papers, dated from 1841 to 1843, inclusive, had been removed to the city of Mexico by order of the proper Spanish authority, and that this admission shall be considered by the Supreme Court as a part of the record in this case.

HOLMES CONRAD,
Solicitor General.
ROCHESTER FORD,
Attorney for Appellants.

[Endorsed:] Case No. 15,657. Supreme Court U. S., October term, 1895. Term No., 429. Santiago Ainsa, adm'r, &c., appellants, *vs.* The United States. Stipulation as to original matrix or expediente.

[Stamped:] Office Supreme Court U. S. Filed Aug. 3, 1895. James H. McKenney, clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 773.

SANTIAGO AINSA, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

It is hereby stipulated and agreed between the parties hereto that the foregoing translation of the titulo, introduced in evidence in the above-entitled cause, shall be substituted for the translation appearing on pages 70 to 98 inclusive in the printed record in this case, and that the same shall be considered as the true and correct translation of such instrument.

It is further stipulated that this stipulation and said substituted translation shall be transmitted to the Department of Justice at Washington, and shall be by said Department printed and caused to be inserted in and as a part of the record in this case.

HOLMES CONRAD,
Solicitor-General.

ROCHESTER FORD,
Attorney for Appellant.

0 [Seal which reads: "Agency of public works in Hermosillo."]

No. 179.] *Duplicate.*

Don José Elias, for himself and in the name of the co-owners of the vacant public lands between the ranch of Casita and the mission of Tumacacori and Calabazas in the upper Pima country, has presented to this agency, in twenty-nine folios, the legal testimonio of the title of seven and one-half sitios for cattle and two short caballerias, which the title of said vacant land covers, and which was issued by the treasury of the department to said Elias and to his parents, Don Francisco Gonzalez and Doña Balvanera Redondo.

Registered under number 179 in the proper book.

Hermosillo, July 31st, 1855.

FLORENCIO MONTEVERDE.

00 Title to seven and one-half sitios and two short caballerias of land for raising cattle and horses contained in the vacant public lands between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas in the upper Pima

country, issued to Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris.

1 [Seal third. One dollar.]

The years 1842 *and* 1843.

Ignacio Lopez, captain of cavalry, retired to the infantry of the army, and treasurer of the department of Sonora:

Whereas article 11 of the sovereign general decree No. 70, of the 10th of August, 1824, ceded to the old States the revenues which in said law the General Government did not reserve to itself, one of which is that from the lands (terrenos) in their respective districts, which therefore belong to them, and for the disposal of which the Honorable Constituent Congress of the State, which was Sonora and Sinaloa united, enacted law No. 30 of the 20th of May, 1825, as did also the successive legislatures other decrees concerning them, which enactments have been retained in sections 3d, 4th, 5th, 6th, and 7th of chapter 9 of the organic law of the treasury, No. 26, of the 11th of July, 1834, the said revenue from lands being now one of those of this Department of Sonora, which have continued and must continue, as provided in article 1 of the decree of the 17th of April, 1837, that of the 28th of the same month of 1839, and of the 24th of December, 1840, as well as the supreme order of the 21st of said month and year; and whereas Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris, have made application for the survey, appraisement and publication, offer and sale of seven and one-half sitios and two short caballerias of land for raising cattle and horses, which comprise the vacant public lands situated between the north boundary of the ranch of Casita and the west boundary of the Mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio, which application is literally as follows:

"I, Francisco Navamuel, judge commissioned to survey a tract of public land registered by Don Francisco Gonzalez, certify: That the superior chief of the treasury of the department has forwarded to me an authenticated copy of certain proceedings had on lands, with a letter of

2 transmittal, which is as follows:

OFFICE OF THE SUPERIOR CHIEF OF THE TREASURY
OF THE DEPARTMENT OF SONORA.

I enclose to you, in ninety-two folios, the proceedings instituted by Don José Elias, for himself and in the name of his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, for the resurvey of the lands of the ranch of Casita, of which they are the owners and possessors, and which are situated in the jurisdiction of the town of Imuris, and also for the survey, appraisement, and publication of the vacant public lands which they say they need, that you may proceed to perform said operations in strict compliance with my decree of commission, which I confer on you for the purpose, under date of to-day, on said enclosed proceedings, for which I also enclose you separately the necessary credentials.

God and liberty.

Ures, May 26th, 1841.

JOSÉ MARIA MENDOZA.

To Don FRANCISCO NAVAMUEL.

And at the end of said authenticated copy there is a decree of the following tenor:

URES, *May 26th*, 1841.

The authenticated copy required by article 76 of the decree of the 17th of April, 1837, having been received from his excellency, the governor and president of the superior board of the treasury of the department, covering the different matters acted upon by said board in the session of the 22d inst., it appears that one of them is of the following tenor:

"As to the second matter, which is the application of Don José Elias, the resurvey of the land he owns was granted him as he requests; and also the survey of the public land he denounces, after the requirements which are customary for its sale. Separate proceedings shall be made for both operations, and a report on the first shall be submitted to the board to enable it to act on the result of the resurvey."

And in due and punctual compliance therewith ample commission is conferred on Don Francisco Navamuel to proceed, without prejudice to third parties who represent a better right, and after citation of the parties in interest and of the coterminous owners, who shall appear with their
3 titles, in person or by agent, to point out and defend their metes and bounds, at the same time having before him the aforesaid enclosed authenticated copy referring to the lands of Casita, owned by Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, situated in the jurisdiction of the town of Imuris, to the exact and scrupulous resurvey of said lands, giving them the area or number of sitios that legally belong to them with due separation of the sitio or sitios that result in excess within the lawful boundaries of said lands of Casita. And at the same time said commissioner shall execute, in separate proceedings, (expediente) the proper survey, appraisement, and publication of the vacant public lands the parties in interest apply for, after the indispensable judicial information which said commissioner, under his own strictest responsibility, shall cause to be taken before a competent judge and shall aggregate to the original proceedings, and which shall be that of three impartial, capable, upright witnesses of practical intelligence, by which it is legally and sufficiently proved that the parties in interest need said vacant public lands and have an abundance of stock to stock them. He shall act in strict compliance with the before inserted decree of the superior board of the treasury of the department and the several provisions of sections 3d, 4th, 5th, 6th, and 7th, of chapter 9 of the organic law of the treasury, No. 26, of the 11th of July, 1834, as also with the regulations for surveying lands for raising cattle and horses, which were made under the provisions of law No. 30, of the 20th of May, 1825, and shall adjust the sitio or sitios contained in said lands of Casita, their overplus, if any there be, and the vacant public lands already mentioned, strictly by said regulations, and the inveterate and constant rule of multiplying the number of varas contained in the diameter from north to south by that of those contained in that from east to west, to give to each sitio the area that corresponds to it, of twenty-five million square varas, and he is cautioned that, as soon as said operations on the excess or overplus that results within the lawful boundaries of Casita are completed, they should not be
4 published but appraised in conformity with article 2 of decree No. 51 of the 12th of May, 1835. And when the proceedings are con-

cluded he shall forward them to this office, and shall summon the parties in interest to hear, in person or by agent, what action the board of the treasury takes in the matter. The superior chief of the treasury of the Department of Sonora thus decreed, ordered, and signed with attendant witnesses.

JOSÉ MARIA MENDOZA.

Witness: JUAN ANTUNES.
Witness: FACUNDO DIAZ.

And in witness thereof I certify and sign in the town of Magdalena, on the 2d of the month of October, 1841, before my attendant witnesses, in the absence of a notary public, there being none, according to law.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

In said town, on said day, month, and year, I, said commissioner, said that, in order to proceed to the survey of the vacant public lands adjacent to the ranch of Casita, draw up the proceedings in continuation of this decree, as the superior chief of the treasury directs. For this purpose summon Don Francisco Gonzalez and the several coterminous owners for the 25th inst., when said survey will begin. Thus I decreed and signed with my attendant witnesses.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: .

On the same date I said: Proceed first to take the information as directed in the superior decree of the chief of the treasury with which, in the form of an authenticated copy, these proceedings begin. For this purpose an official communication is sent to the court of the justice of the peace of the town of Imuris, in which I enclose the order of said chief in whatever may legally occur to me to carry out my commission, and I request him to take the said information, as it is easier to find witnesses among those who, from the proximity in which they live to the ranch where the party in interest has his stock, should possess all the qualifications required of them. Thus I decreed, ordered, and signed with my attendant witnesses.

FRANCISCO NAVAMUEL.

Witness: JOSÉ L. GALLEGOS.
Witness: SIMON MARIN.

I forward to you, for official purposes, the accompanying communication, which the superior chief of the Treasury sends to you through me and, in compliance therewith, I trust you will be pleased to take the information of three impartial, upright witnesses of practical intelligence, sufficient to prove whether or not Don Francisco Gonzalez needs the vacant public lands between the ranch of Casita and that of Calabazas, also whether he and his wife have an abundance of stock to stock them. And when concluded you will have the kindness to return the originals to me to be aggregated to the proceedings in the matter.

God, etc.

Dated 3d of October, 1841.

To the justice of the peace of the town of Imuris.

MAGDALENA, *October 12th*, 1841.

Aggregate to these proceedings the information which the second justice of the peace of Imuris sends to me; and since it is proved therein that the parties need the lands they have registered, make the survey on the 25th inst. as ordered. Thus I decreed and signed with my attendant witnesses.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

I forward to you the accompanying information of three impartial witnesses which, in a communication of the 4th of October, you requested of this court, and which is in two folios. With this I offer to you my highest regards.

God and Liberty.
Imuris, November 8th, 1841.

JOSÉ FRAIJO.

To Don FRANCISCO NAVAMUEL.

COURT OF IMURIS.

In the town of Imuris, on the 6th day of the month of October, 1841, I, the judge of this town, Citizen José Fraijo, in compliance with the foregoing communication, proceeded to take the information of three impartial, upright witnesses of practical intelligence. Thus I ordered and signed with my attendant witnesses, in the absence of a notary public, according to law.

JOSÉ FRAIJO.

Witness: EDUARDO SOTO.
Witness: MANUEL SOTO.

Thereupon I caused to appear in this court Citizen Francisco Armenta, a resident of this town whom I certify I know, and with all the customary formalities required by the circumstances of the matter he was asked if he knows whether Don Francisco Gonzalez and his wife, Doña Balvanera Redondo, have sufficient stock to stock the vacant public lands
6 between the ranch of Casita and Calabazas, and he replied that between Don Francisco Gonzalez and his wife they have four thousand head of cattle, a little more or less; and this he states because he has taken part in the roundup of cattle when said Don Francisco Gonzalez has employed him for that purpose. And this is what he is able to say in regard to the question asked him, which I authenticate and sign with those of my attendance, according to law, which I attest.

JOSÉ FRAIJO.

Witness: EDUARDO SOTO.
Witness: MANUEL SOTO.

Thereupon I caused to appear Citizen Domingo Soto, a resident of this town and an upright man of practical intelligence, and with all the usual formalities he was asked if he knows whether Don Francisco Gonzalez and his wife have sufficient stock to stock the vacant public lands between the ranch of Casita and Calabazas, and he replied, that said Don Fran-

cisco has about four thousand head of cattle and a few sheep, which is all he says on the matter, and which he signed with me and my attendant witnesses according to law.

JOSÉ FRAIGO.
JOSÉ DOMINGO SOTO.

Witness: EDUARDO SOTO.
Witness: MANUEL SOTO.

On the same day, month, and year I caused to appear Citizen Luis Villa, a resident of this town whom I certify I know, an upright man of practical intelligence, and with all the usual formalities he was asked if he knows whether Don Francisco Gonzalez has sufficient stock to stock the vacant public lands between the ranch of Casita and Calabazas, and he replied, that Don Francisco Gonzalez has one hundred thousand head of cattle, a little more or less, and besides a few sheep, which is all he says on the matter about which he is questioned. He did not sign because he does not know how. I signed with my attendant witnesses according to law, which I attest.

JOSÉ FRAIJO.

Witness: EDUARDO SOTO.
Witness: MANUEL SOTO.

The preceding investigation having been concluded, return the originals to the judge-surveyor for the proper purposes. I, the justice of the peace, thus decreed, ordered, and signed in witness thereof.

JOSÉ FRAIJO.

7 Witness: EDUARDO SOTO.
Witness: MANUEL SOTO.

In said town, on the thirteenth of said month and year, I notified Don Francisco Gonzalez of the foregoing decree, and when he understood it he said that he hears it and signed it with me and my attendant witnesses.

FRANCISCO NAVAMUEL.
FRAN'CO GONZALEZ.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

On the same date, and having been informed by the party that the only lands coterminous with the public lands I am going to survey are the ranch of Casita, owned by said Gonzalez, and that of Calabazas, belonging to the mission of Tumacacori, which is under the charge of the reverend father, president and minister of these missions, Friar Antonio Gonzalez, his reverence was summoned to appear, in person or by agent, with his titles, to point out and defend the boundaries of said Calabazas, for which exhortation he was shown the commission conferred on me, and he replied to me verbally that for the matter under consideration Marcelo Bonilla had a special power of attorney from his reverence, and that he would send him with the titles and the necessary instructions and that I could treat with him. And in witness thereof I authenticate and sign with my attendant witnesses.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

I certify that, because of the absolute lack of stamped paper in this whole district, I am writing my proceedings on this common paper with the promise of the party to replace it at the first opportunity.

FRANCISCO NAVAMUEL.
JOSÉ GALLEGOS.

At the ranch of Casita, on the twenty-fourth day of said month and year, having already completed the resurvey of this said ranch, as appears from the main proceedings, and as much for that reason as because the parties, the coterminous owners and assistants are together, I proceeded to the survey of the vacant public lands, notwithstanding it had been previously set for to-morrow. For this purpose I appointed for chainmen
Citizens Angel Olave and Miguel Apodaca; for tallyman, Citizen
8 José Fraijo, and for recorder Citizen José Gallegos who, when informed of said appointments, took the oath before me, by God, our Lord, and the sign of the cross, to discharge their duties well and faithfully according to their understanding. Thus those who knew how signed with me and my attendant witnesses.

FRANCISCO NAVAMUEL.
JOSÉ GALLEGOS.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

Subsequently, and being at the north cross monument of the ranch of Casita in company with the parties, coterminous owners, assistants, and other persons who accompanied me because the country is dangerous, I ordered made a cord on which fifty varas were measured, and with it I began the survey from said point, directing myself along the public road that goes toward the north to the presidio of Tubac, and they went measuring and counting two hundred and ninety-five (295) cords until they arrived at a place they call Nogales, where I ordered a halt, as it was now sundown, and because Marcelo Bonilla, the agent of Father Friar Antonio Gonzalez, stated to me that he had summoned for to-day the governor of the Indians of Tumacacori to point out the monuments of said town or of the depopulated Calabazas, and that I be pleased to suspend the prosecution of the survey to await his arrival, to which I assented, and entered this minute, which I authenticate and sign with said coterminous owner, the assistants, and my attendant witnesses.

FRANCISCO NAVAMUEL.
MARCELO BONILLA.
JOSÉ GALLEGOS.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

At said place of Nogales, on the twenty-sixth day of said month and year, Don Marcelo Bonilla having stated to me that up to date the governor of Tumacacori had not appeared, and that for that reason he had gone out to look for the monument of Calabazas, and that he had found it beyond this point in the same place described in the papers of said Calabazas, which he has with him, and that, therefore, I could proceed with the survey, I ordered the cord stretched in the same direction, north, and they went measuring and counting along said high road forty-five (45) cords which, together with those measured on the twenty-fourth day

of this month, make three hundred and forty, which ended on the
9 high road, in a flat, where a wide canyon that comes down from the slope of the Pajarito Mountains terminates, and there I ordered the party to place a monument, that of Calabazas being about a thousand steps further on on a high hillock which slopes down on the other side of said canyon. At this place the compass was set up to determine the courses, from which operation and from examination of the titles of Calabazas and also from the information of several individuals I was convinced that here was the limit of the lands of the mission.

Having asked the party how he wanted the land squared, he replied that he wanted twenty cords to the east; and thereupon they were measured for him twenty-two (22) cords from the monument which is in the high road, in a straight line guided by the compass, to a hillock that has many oak trees on its slope, and on the summit a pile of stones was placed as a monument. Having returned to said cross monument on the high road I set up the compass in good adjustment, and by it directed myself toward the west, where I went measuring and counting fifty cords until I reached very broken ground, which it was impossible to measure with the cord, for which reason I made a scrupulous estimate, together with my assistants, of one hundred and fifty cords, until I arrived to where the Pajarito Mountains turn to the north near the place they call Calaveras, said Pajarito Mountains having been crossed and within the land surveyed, and there I ordered the party to place a pile of stones as a corner monument.

Thus the north boundary was closed with two hundred and twenty-two (222) cords from the west corner monument to the east corner monument, and is limited by the lands of the mission. And having returned to where I began the survey, which is the north cross monument of Casita, I set up the compass in good adjustment and stretched the cord toward the east with twenty-two (22) cords, which ended upon some hillocks at the trunk of an oak tree, where a pile of stones was placed. And having returned to said cross monument I set up the compass in good adjustment, and by it there were measured and estimated in several stretches of rough ground, toward the west, two hundred (200) cords, which
10 ended on a whitish ridge that has considerable pasture, near the so-called Planchas de Plata, which ridge divides the streams that flow toward the ranch of Agua Caliente and those that go toward Agua Zarca. Thus the south boundary was closed with another two hundred and twenty-two (222) cords and is limited there by the ranch of Casita. In this manner was terminated the survey of the vacant public lands, which include seven and one-half sitios, and the party, when it was made known to him, was satisfied and understood the area it incloses and was warned to place, at the first opportunity, fixed monuments of stone and mortar; and in witness thereof he signed with me, the agent of the Reverend Father Friar Antonio Gonzalez, the assistants who know how, and my attendant witnesses.

FRANCISCO NAVAMUEL.
MARCELO BONILLA.
JOSÉ GALLEGOS.
FRANCISCO GONZALEZ.
JOSÉ ELIAS.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

Thereupon at the place, La Tinaja, on the north boundary of the ranch of Casita, having already completed the survey of the vacant public lands for which the superior chief of the treasury of the department commissioned me, and which was made for Don José Elias and Don Francisco Gonzalez, I stated that it was my duty to order, and I did order, that the appointment of practical, intelligent, and conscientious persons to appraise the land be proceeded with as provided in the organic law of the treasury, No. 26, of the 11th of July, 1834, and, for this purpose, I appointed the agent of the mission, Don Marcelo Bonilla, and the justice of the peace of Imuris, Don José Fraijo, persons in whom, besides the qualifications said law requires, concur the circumstance of having a practical knowledge of the land they are to appraise; and in witness thereof I sign with my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness:

Subsequently I made known to said citizens, Marcelo Bonilla and José Fraijo, the appointments made in their persons for the appraisement of the seven and one-half sitios of land for raising cattle and horses which the vacant public lands surveyed for Don José Elias and Don Francisco Gonzalez contain. Upon their acceptance thereof I administered the oath to them before God and the sign of the holy cross, under which they offered to discharge their duties well and faithfully, and signed with me and my attendant witnesses, according to law.

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FRANCISCO NAVAMUEL.
MARCELO BONILLA.
JOSÉ FRAIJO.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

Thereupon said citizens Don Marcelo Bonilla and Don José Fraijo appeared and stated that, after having conferred and being well informed as to the provisions of section 4, articles 64 and 65 of the Organic Law of the Treasury, they would appraise, and in fact have appraised, the seven and one-half sitios of land for raising cattle at the rate of fifteen dollars ($15), because they are all dry and can only serve for pasturing stock, the total value of said seven and one-half sitios amounting to one hundred and twelve dollars (112–4) and four reals, and, as I was satisfied with the appraisement, they signed with me and my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.
MARCELO BONILLA.
JOSÉ FRAIJO.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

In the town of Magdalena, on the fifteenth day of the month of November, 1841, the sitios surveyed for Don José Elias and Don Francisco Gonzalez having now been appraised, I stated that it was my duty to order, and I did order, that they be published by the public crier for thirty consecutive days in the town of Imuris, as provided in article 75, section 7, of the

Organic Law, in solicitation of bidders who may make a better valuation, for which purpose handbills shall also be posted in public places and the bids they make shall be received. And by this decree I, the judge-commissioner, thus ordered and signed with my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

First publication.

IMURIS, *November* 11*th*, 1841.

The vacant public land between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, comprising seven and one-half sitios of land surveyed for Don José
12 Elias and Don Francisco Gonzalez are appraised at one hundred and twelve dollars and four reals: If any person wishes to make a better bid, come forward to the commission of survey and it will be admitted, for which purpose this first publication is made, which I attest.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

(NOTE.—The publications from the 2d to the 29th, inclusive, and made on the successive days, from the 12th of November to the 9th of December, 1841, are all of the same tenor as the foregoing, and for that reason are omitted in this translation.—The Translator.)

Thirtieth publication.

IMURIS, *December* 10*th*, 1841.

The vacant public lands between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, comprising seven and a half sitios for raising cattle, and surveyed for Don José Elias and Don Francisco Gonzalez, are appraised at one hundred and twelve dollars and four reals. If any person wishes to make a better bid, come forward to the commission of survey and it will be admitted, for which purpose this last publication is made, and in witness thereof I sign with my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

IMURIS, *December* 13*th*, 1841.

No bidder having appeared up to the present, and these proceedings of survey being concluded, I, the judge of the commission, therefore said: Forward them to the superior chief of the treasury, and summon the parties in interest to be present at Ures, the capital, in person or by agent, with instructions, and expenses paid, at the sale of said public lands. And by this decree I so decreed, ordered, and signed with my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.

Witness: SIMON MARIN.
Witness: JOSÉ L. GALLEGOS.

In the town of Magdalena, on the 24th day of said month and year, Don José Elias having been summoned to appear at the treasury
13 of the department as the agent of his parents, Don Francisco Gonzalez, I was notified that he was absent, for which reason I ordered the transmittal of these proceedings suspended until he could be informed of the foregoing decree, and in witness thereof I signed with my attendant witnesses, according to law.

FRANCISCO NAVAMUEL.

Witness: LORETO ELIAS.
Witness: JOSÉ MARIA RONJEL.

In said town on the 2d day of the month of August, 1842, Don José Elias having returned from the place where he was, I summoned him before me to notify him of the foregoing decree of the 13th of last December, and when informed thereof he replied that he would appear, in person or by agent, at the treasury of the department for the purposes indicated to him. This he said and signed with me and my attendant witnesses.

FRANCISCO NAVAMUEL.

Witness: LORETO ELIAS.
Witness: JOSÉ MARIA RONJEL.

Memorandum.

These proceedings in fifteen folios were forwarded to the treasurer of the department to-day, August 16th.

In witness whereof I have attached my rubrick.

FRANCISCO NAVAMUEL.

COMMISSION OF SURVEY.

I have the honor to forward to your excellency the accompanying report, which begins with an application of José Elias and the proceedings had before the extinguished office of the superior chief of the treasury, in compliance with which I made said report, and that which by separate order I was instructed so to make, which I also enclose to your excellency in fifteen folios. Upon making this transmittal, I have the honor to protest my distinguished regards and attention.

God and Liberty.

Magdalena, August 17th, 1842.

FRANCISCO NAVAMUEL.

To the TREASURER OF THE DEPARTMENT.

URES, *September 7th*, 1842.

DON IGNACIO SANTOS ELIAS:

MY DEAR SIR: I hereby confer on you my full power of attorney with ample authority to proceed to the treasury of the department and to act, as I have done, for myself and as agent of my stepfather, the husband of my mother, Doña Balvanera Redondo, in the proceedings in the
14 matter of the ranch of Casita and the adjacent vacant public lands which were surveyed for my said stepfather. Accordingly I trust

you will be pleased to be present at the last three public offers and sale to be made of said public lands, to receive the title and make the corresponding payment as per the instructions I give you in a separate letter, with power, in case you care to do so, to substitute this letter of attorney.

I am your obedient servant, etc.,

JOSÉ ELIAS.

ARIZPE, *November 25th*, 1842.

Report to the superior board of the treasury of the department the foregoing proceedings on the survey, appraisement, and publications of the vacant public lands of the ranch of Casita surveyed for Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, and forward a separate report of the resurvey o said Casita for such action as it may deem proper, in accordance with superior instructions on the matter. The treasurer of Sonora thus decreed and signed with his attendant witnesses, according to law.

IGNACIO LOPEZ.

Witness: ANTONIO T. Y PERALTA.
Witness: JOAQUIN URIAS.

ARIZPE, *November 28th*, 1842.

In compliance with the order of to-day from the superior board of the treasury of the department, forward the proceedings cited in the foregoing decree to the attorney-general of the treasury, who will be pleased to give his opinion in the matter.

LOPEZ.

To the TREASURER OF THE DEPARTMENT:

Don José Elias, for his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, owners and possessors of the ranch of Casita, in the upper Pima country, in an application of the 6th of May, 1841, applied to the extinguished office of the superior chief of the treasury of the department, soliciting the resurvey of said ranch and the survey of the vacant public lands they needed, and offered competent proof. Report of this application was made by the office of the chief to the superior board of the treasury, as provided in the supreme order of the 21st of December, 1840, and said board ordered that his own land be resurveyed for Don José Elias, as he requested, and also that the public lands he denounced be surveyed for him, with the customary formalities for its sale; that separate reports be made of both operations, and that a report of the first be made to said board, that it may take action on the result of the resurvey. The office of the chief of the treasury, in compliance therewith, issued, on the 26th of May, 1841, full and proper commission and instructions to Don Francisco Navamuel, a resident of Magdalena, to perform said two separate operations of survey. Navamuel accepted the commission in a minute of the 1st of September of said year, and summoned the parties in interest and the reverend father, Friar Antonio Gonzalez, president and minister of the missions of the upper Pima country, as administrator of the temporalities of the town of Imuris, Tumacacori, and Calabazas, coterminous with Casita. Don Marcelo Bonilla appeared

as the agent of said reverend father president, with instructions, and the second justice of the peace of Imuris, Don José Fraijo. After appointing his assistants, tallyman, chainmen, and recorder, who were sworn according to law, the commissioner proceeded, on the 21st of October, 1841, and in the manner provided by law, to the resurvey of the ranch of Casita, from which there resulted within this property the same nine sitios the original surveyor, José Olave, measured and estimated on the 28th day of April, 1742, and nine million two hundred thousand square varas more, which do not make half a sitio, and, even if they had reached that fraction, they should not be considered as overplus (demasias), under the provisions of the last clause of article 2 of decree No. 51 of the 12th of May, 1835, of the old state, and which is still in force. In this manner the commissioner, Don Francisco Navamuel, concluded, with a summons to Don José Elias, the report of the resurvey, as appears from the proceedings in seven folios, the last three being on common paper, which are to be replaced by the parties with the corresponding stamped paper, in accordance with the law on the matter, that the revenue may be indemnified and said proceedings admissible. Then the commissioner had judicial information taken separately, before the second justice of the peace of Imuris, of three impartial, upright, and intelligent witnesses, by which it is proved that
16 the said Don Francisco Gonzalez and his wife, Doña Balvanera Redondo, and their son, Don José Elias, need the public lands they have registered, and also have sufficient live stock to stock them. And after summoning said parties in interest and Marcelo Bonilla, the agent of the missions of said town of Imuris and of that of Tumacacori, and after appointing his assistants, chainmen, tallyman, and recorder, he proceeded, on the 24th and 26th of October, 1841, to the survey of the vacant public lands already mentioned, situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, the result being that they contained three hundred and forty (340) cords from north to south and two hundred and twenty-two (222) from east to west, which, reduced to varas and multiplied one by the other, give an area of one hundred and eighty-eight million seven hundred thousand (188,700,000) square varas, that make seven and one-half sitios and two caballerias, a little short, for raising cattle.

Thereupon the commissioner appointed and formally administered the oath to Don Marcelo Bonilla and Don José Fraijo as appraisers of said public lands, and these intelligent and practical experts appraised the seven and one-half sitios at one hundred and twelve dollars four reals, at the minimum rate of fifteen dollars each, as they are all dry and can only serve for pasturing cattle; but by an involuntary error in adjusting the area of the public lands surveyed no account was taken of the two short caballerias which they also contain, as I have demonstrated, and are to be valued at five reals ten grains, at said rate of fifteen dollars per sitio, for which reason the total value of said lands should be one hundred and thirteen dollars, one real and ten grains. And finally, having had the public crier advertise said surveyed public lands for thirty consecutive days in solicitation of bidders, and none having appeared, the commissioner concluded the proceedings on the 13th of December, 1841, and, after summoning Don José Elias, forwarded the report thereof to the

treasury, with a communication of the 27th of last August, in
17 fifteen folios, his judicial proceedings, written on fourteen of them of common paper, for want of the corresponding stamp paper, with which the parties must replace said fourteen folios to indemnify the revenue. And as your excellency, complying with the provisions of the supreme order on the matter of the 21st of December, 1840, has already been pleased to bring to the knowledge and action of the superior board of the treasury of the department, the report of the resurvey of the ranch of Casita and that of the survey of the vacant public lands, which I have analyzed, all the requirements of the laws, decrees, and instructions that govern in the matter being thus complied with, I am of opinion that your excellency be pleased to order, after summoning Don Ignacio Santos Elias, or whoever acts as agent for Don José Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, as appears in the letter at folio 17, that the treasury makes three public offers of said seven and one-half sitios and two short caballerias of public land for raising cattle and horses, included between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, to which these proceedings refer, and that the sale be made to the highest bidder or bidders that appear, to whom, after the payments they shall make into the public vaults of the value of said lands and of the six dollars for the last public offer, the corresponding title be issued for their security, the fees for which they shall also pay into the national treasury.

This is what I ask in the faithful discharge of the duties of my office, but your excellency, nevertheless, will decide as seems most just and expedient.

Hermosillo, December 5th, 1842.

JOSÉ MARIA MENDOZA.

ARIZPE, *January 5th*, 1842[3].

As appears to the attorney-general of the treasury, in his foregoing opinion, proceed to the three customary public offers for the sale of the land to which these proceedings refer, and summon for that purpose the voting members who compose the said board of sales, in accordance with article 73 of the decree of April 17th, 1837, and the second clause of article 1 of
18 that of the 7th of December, of the same year.

IGNACIO LOPEZ.

First public offer.

In the city of Arizpe, on the 5th day of the month of January, 1843, the board of sales assembled in the office of the treasury of this department, the treasurer, Ignacio Lopez, as president, and the voting members who compose it, who are the first alcalde of this city, Don Raimundo Vazquez; the receiver of the combined revenues, Don Narciso Garcia Herreros, and the second officer of the treasury, Don Alejo Carrillo, who, in the absence of the auditor, acts as secretary (the attorney-general, who is the late superior chief of the treasury, Don José Maria Mendoza, not being present, but absent on business of the superior government), said board ordered that at the sound of the drum a publication be made to the

public by the public crier, which the public crier, Victor Escalante, thereupon did in a clear and loud voice, saying: "There are going to be sold, on account of the public treasury of the department, seven and one-half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in favor of José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris, and appraised at one hundred and thirteen dollars one real and ten grains. Whoever wishes to make a bid for said land, come forward and make it to this board of sales, where the bid made in accordance with the laws on the matter will be received, with the understanding that day after to-morrow the sale will be made to the best bidder." And none having come forward, a minute was entered, which the president and voting members of this board of sales signed in witness thereof.

LOPEZ.
VAZQUEZ.
GARCIA HERREROS.
ALEJO CARRILLO, *Secretary.*

Second public offer.

In said town, on the 6th day of said month and year, this board of sales having reassembled, a publication in all respects like the foregoing 19 was made, with the sole difference that it was stated to the public that at twelve o'clock to-morrow the land referred to in these proceedings would be sold without fail to the highest bidder. None having appeared, a minute was entered which the president and voting members of this board signed in witness thereof.

LOPEZ.
VAZQUEZ.
GARCIA HERREROS.
ALEJO CARRILLO, *Secretary.*

Third public offer and sale.

In the city of Arizpe, on the 7th day of the month of January, 1843, the board of sales having assembled in the office of the treasury of the department, the treasurer, Ignacio Lopez, as president, and the voting members who compose it, who are the first alcalde of this city, Don Raimundo Vazquez; the receiver of the combined revenues, Don Narciso G. Herreros, and the second officer of the treasurer, Don Alejo Carrillo, who, in the absence of the auditor, acts as secretary (the attorney-general, who is the late superior chief of the treasury, Don José Maria Mendoza, not being present, but absent on business of the superior government), said board ordered that at the sound of the drum a publication be made to the public by the public crier, which the public crier, Victor Escalante, thereupon did in a loud and clear voice, saying: "There are going to be sold, on account of the public treasury of the department, seven and one-half sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas in the upper

Pima country, in favor of José Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, residents of the town of Imuris, and appraised at one hundred and thirteen dollars one real and ten grains. Whoever wishes to make a bid for said land, come forward and make it to this board of sales, where the bid made in accordance with the laws on the matter will be received, with the understanding that the sale is to be made now to the highest bidder."

Thereupon Ignacio Santos Elias, in the name and as the agent of Don José Elias and of his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, came forward and again offered for his principals the one hundred and thirteen dollars one real and ten grains in which the land was appraised, and, the hour for midday prayer of this day having already struck, the public crier for the last time said: "Once, twice, three times; sold, sold, sold; may it do much good, good, good to Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo." In these terms this act was terminated and there were publicly and solemnly sold the seven and one-half sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the jurisdiction of the town of Imuris, for the sum of one hundred and thirteen dollars one real and ten grains, in which they were appraised. And in due witness thereof these proceedings were closed and signed by the president and voting members of this board of sales, together with the said agent, Ignacio Santos Elias.

IGNACIO LOPEZ.
NARCISO G. HERREROS.
ALEJO CARRILLO, *Secretary*.
IGNACIO SANTOS ELIAS.

ARIZPE, *January 7th*, 1843.

The sale of the seven and one-half sitios and two short caballerias of land referred to in these proceedings having been concluded, notify and inform Don Ignacio Santos Elias, agent of Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, to pay into this treasury the one hundred and thirteen dollars one real and ten grains at which said land was sold in strict compliance with the order made by the superior board of the treasury in its session of August 31st, 1842, and with the instructions of his excellency the commandant-general, inspector of the offices of the treasury of the department, in an official communication of the 2d of December of said year, and aggregate to the proceedings the voucher that certifies said payment in the usual form, and when this is done issue the proper title for their security. The treasurer of Sonora thus ordered and signed with attendant witnesses, according to law.

I. LOPEZ.

Witness:
ANTONIO T. Y PERALTA.
Witness:
FRANCISCO S. CARRILLO.

21 On the same day Don Ignacio Santos Elias, agent of Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, being present was notified and informed of the preceding minute, and, when he well understood it, said that he hears it and is now ready to make the payment required of him. This he replied, and signed with me and my attendant witnesses, according to law.

IGNACIO LOPEZ.
IGNACIO SANTOS ELIAS.

Witness: ANTONIO T. Y PERALTA.
Witness: FRANCISCO S. CARRILLO.

I, Ignacio Lopez, captain of cavalry, retired to the infantry of the army, and treasurer of the department of Sonora, certify that at folio 4 of the provisional memorandum book of receipts of the current year there is entered the following item:

January 7th. Receipts in net proceeds of the revenues of the department, one hundred and thirteen dollars one real and ten grains, which, in the name and as the agent of Don Francisco Gonzalez and Doña Balvanera Redondo, Don Ignacio Santos Elias paid to-day, being the value of seven and one-half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, sold at public sale to said Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris. Of the present entry the corresponding certificates are issued for the purposes provided in the superior order cited at folio 2 under No. 2, 113, 1, 10.

LOPEZ.
VILLAESCUSA, *Inspector*.
IGNACIO SANTOS ELIAS.

22 And in witness thereof I give this present certificate in Arizpe on the 7th day of January, 1843.

IGNACIO LOPEZ.

In these terms these proceedings were concluded with all the requirements and formalities the laws, regulations, and superior instructions on the matter provide, said original proceedings being deposited in the archives of this office, in the treasury of this department, as a perpetual testimony.

Therefore, by virtue of the authority which the laws, regulations, and superior orders that govern in the matter confer on me, by these presents, in the name of the Mexican nation, I grant, in due form of law, seven and one-half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public land situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio, to Don José Elias and to his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris, in said district, to whom I cede, give, and adjudicate said lands, by way of sale, and with all the requisites,

stability, and permanence the laws establish, for themselves, their children, heirs, and successors, with all their entrances and exits, uses, customs, servitudes, timbers, shrubbery, woods, pastures, springs, watering places, and everything else that belongs or may legally belong to them, with the precise qualification and necessary condition that they are to keep said lands stocked and occupied, without their being unstocked, deserted, or unoccupied for any time, with the understanding that if their total abandonment for the space of three consecutive years should occur, and there should be any person who denounce them, in such event, upon proof of the fact, they shall be declared public lands and shall be adjudicated again to the highest bidder, except, as is just, those cases where the abandonment is on account of the notorious invasion of enemies, and then only for the time of such occurrences. Don José Elias and his parents,
23 Don Francisco Gonzalez and Doña Balvanera Redondo, and their children, heirs, and successors, being cautioned, as they are strictly cautioned, to restrict and limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey; to observe and exactly comply with the provisions of article 63 of the organic law of the treasury, No. 26, of the 11th of July, 1834, which imposes on them the obligation to maintain at their boundary termini monuments of stone and mortar, subject to a fine of twenty-five dollars, which shall be exacted of them, if they violate said law, by the proper local judge, for the common funds; and said monuments shall be constructed at the expense of the parties in interest.

And with the same authority the laws confer on me, I order and command the judges, justices, and local authorities, who at present are and may hereafter be in the district of San Ignacio, for the sake of good and proper administration of justice and in compliance with the laws on the matter, not to allow the said parties in interest, Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, their children, heirs, or successors to be in any manner disturbed, annoyed, or molested in the free use, exercise, ownership, dominion, and possession of said seven and one-half sitios and two short caballerias of land, comprising the vacant public lands between the boundaries of Casita and those of Tumacacori and Calabazas, but rather, they shall constantly watch and see, with the greatest vigilance and activity, that they are always protected and maintained in the quiet and peaceable possession to which they are entitled by legitimate right, so that they can, in this manner, freely possess, enjoy, hold, sell, exchange, barter, donate, transfer, cede, and alienate said seven and one-half sitios and two short caballerias of land, at their free election, as absolute owners and proprietors of said lands. In which terms I issue the present formal title to said Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, their children, heirs, and successors, and deliver it to their agent, Don Ignacio Santos Elias, to
24 place in the hands of Don José Elias, the party in interest and the agent of his parents, after recording it in the proper book.

Given in the city of Arizpe, on the 7th day of the month of April, 1843, authenticated and signed by me and sealed with the seal of the commissary-general, which the treasury of this department legally uses, before the undersigned witnesses of my attendance, in the absence of a notary public, there being none, according to law.

[NOTE.—Here follows a list of clerical errors in the original and their corrections. They disappear in the translation and are of no importance here.—THE TRANSLATOR.]

IGNACIO LOPEZ.

Witness: ANTONIO TERAN Y PERALTA.
Witness: JOAQUIN URIAS.

Record of the present title is made at folio 64, back of the proper book, which exists in the treasury of this department.

I, Ignacio Lopez, captain of cavalry, retired to the infantry of the army, and treasurer of the department of Sonora, certify, that at folio 5 of the provisional memorandum book there is entered the following item:

January 7th. Receipts in net proceeds of the revenues of the department, thirty dollars, which, in the name and as the agent of Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, Don Ignacio Santos Elias paid into this treasury, being the cost of the title which was to said first three individuals to seven and one-half sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of Tumacacori and Calabazas, in the upper Pima country, the proper certificates of the present payment being issued as provided in the order already cited at folio 2, under No. 2, 30, 0, 00.

LOPEZ.

IGNACIO SANTOS ELIAS.

And in witness thereof I give the present certificate in Arizpe, on the 7th of January, 1843.

IGNACIO LOPEZ.

Schedule of costs incurred in the issue of the title to seven and one-half sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of the ranch of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio, in favor of Don José Elias and of his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, which costs were paid by Don Ignacio Santos Elias, as agent of said parties, to wit:

	Dols.	Reals.	Grains.
For the principal value of the land	113	1	10
Fees for the last public offer and sale	6	.....	.....
For the cost of the title	30	.....	.....
For the opinion of the attorney-general	3	.....	.....
For the drum and public crier	2	.....	.....
For two sheets of paper, seal 4th, on which were written the notices of the sale to the public	0	4	.....
For one sheet, seal 3d, and thirty of seal 4th, on which the title was written	8	4	.....
For five sheets of seal 3d, on which were presented the last proceedings in the original report, and seven sheets more of the same seal, which were replaced	12	.....	.....
Total	175	1	.....

Treasury of the department of Sonora, Arizpe, January 7th, 1843.

IGNACIO LOPEZ.

27 By supreme resolution of this date, the adjudication of the land referred to in this title issued on the 7th of January, 1843, is approved, under the provisions of article 3 of the law of December 3d, 1855, and it is therefore legally confirmed.

And in witness thereof and for the purposes that may be necessary this endorsement is made in the department of public works, in Mexico, on the 7th of July, eighteen hundred and eighty-six.

M. FERNANDEZ, *Chief Clerk.*

(Indorsement on cover:) Case No. 15657. Term No., 773. Santiago Ainsa, admr., &c., appts., vs. The United States. Translation of titulo and stipulation in regard to same. Supreme Court U. S. October term, 1894. Filed May 24, 1895.

OCT. 3 1895
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 429.

SANTIAGO AINSA, ADM'R, ETC., *et al*, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANTS.

ROCHESTER FORD,
Attorney for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 429.

SANTIAGO AINSA, ADM'R, ETC., *et al.*, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANTS.

STATEMENT OF THE CASE.

This case was instituted in the Court of Private Land Claims by the filing on the part of the United States, under the 8th section of the act of March 3, 1891, creating that court, of the petition set out on pages 1 – 6 of the record. The petition alleged that defendants were asserting a claim to a certain Mexican land grant commonly known as and called the "Los Nogales de Elias" claim, lying partly in Pima County, Arizona, and partly within the Republic of Mexico, and alleged that for various reasons said claim was unfounded and invalid, and prayed that said land grant be declared null and void. Most of

the points alleged in the petition were abandoned on the trial, and the grounds on which the government chose to rely are set out on pages 35 – 37 of the record. These grounds were four, viz., first, that the answer of defendant Ainsa was insufficient to support any claim; second, that the grant must have been confirmed by the national government of Mexico, and that without such confirmation it was absolutely null and void; third, that the grant was a grant by quantity—a grant of 7½ sitios, and, fourth, that in 1853 there remained in the archives of Mexico no record of this title. The answers and amended answers of defendants (rec., pp. 24 - 30) were to the effect that by sundry mesne conveyances they were the owners of said grant, which grant defendants averred was a complete and perfect title in fee to all the lands embraced within the landmarks and monuments described in the title-paper. The answers further alleged that the grant was made by the officers whose signatures are affixed to the title-paper, and that the title was issued in conformity with the laws recited in the title-paper, and defendants prayed for a decree of the court adjudging the grant to be a complete and perfect title in fee, and adjudging defendants to be the owners thereof in fee according to their respective interests therein as shown by the deraignment of title.

At the trial of the case the court ruled, against defendants' objection, that the burden of proof was on defendants. Defendants thereupon offered in evidence, after proof of its genuineness, the original testimonio of the grant known as the Los Nogales de Elias and a translation thereof. This title-paper appears on pages 1-20 of the supplemental record. Defendants offered also the conveyances showing their deraignment of title, which conveyances are by stipulation omitted from the record. Testimony was offered, also, of the location of the landmarks and monuments called for in the title-paper, and a

map was introduced in evidence, showing the tract of land surveyed by the Mexican officials in 1841, according to the calls and field-notes of such survey as set out in the title-paper. Evidence was introduced that the grant was recorded in the book of Toma de Razon now existing in the office of the treasurer general of Sonora, at Hermosillo, Sonora, Mexico.

The government offered evidence, which was objected to by defendants as immaterial, showing that the distances called for to reach the monuments and natural objects designated in the title-paper were inaccurate, and that the quantity of land actually embraced within the monuments designated in the title-paper was greater than the quantity which the title-paper states the grant contains, viz., 7½ sitios and two short caballerias, and also offered in evidence, against objection of defendant Ainsa, certain proceedings instituted in Mexico in 1882 on behalf of one José Camou for the purpose of denouncing under the laws of the present Mexican State of Sonora the excess in Mexico of land within the boundaries set out in the grant over the quantity spoken of therein.

The facts as shown by the title-paper and at the trial are that one Elias owned in 1841 a certain grant called the Casita grant, to the north or west of which, some distance off, was the mission grant of Tumacacori and Calabazas. The tract of land between the north boundary of the Casita and the west or south boundary of the Tumacacori was vacant public land, and Elias denounced this tract, petitioning the Mexican government to proceed with the usual requirements of survey, appraisement and offers at auction preliminary to its sale. The tract of vacant land between the two grants was surveyed and appraised, the details of the survey being set out in full in the title-paper (pp. 7–8). Part of the measurements were made with a rope, and other distances which, on account of the roughness of the country, could not be

measured, were estimated. The area of the tract according to these measurements and estimates was 7½ sitios and two short caballerias, and the land was appraised on this basis and a sale made in due form after the usual preliminaries, and final title in fee was delivered to the grantees, all of which is fully set out in the title-paper.

It was shown by the government that this tract of vacant public land which the Mexican officials calculated to contain only 7½ sitios, etc., actually contains, as found by a more careful survey, much more than this quantity. The only point decided by the court below was that the grant was one of quantity for 7½ sitios and two short caballerias and no more, and that it had not been located. Appellants claim that it is a grant of the whole tract as surveyed, lying between the two ranches, and that the discrepancy between the estimated and the actual area is due simply to the fact that some of the distances mentioned in the survey were estimated and that those which were measured were measured inaccurately. In rendering its first decision in the case the court held in an oral opinion, never reduced to writing, that the quantity above named, 7½ sitios, etc., was located within the Republic of Mexico, south of the international boundary line, and rejected the claim of defendants for any lands in the United States. A petition for a rehearing was granted and the case reargued, and the court then took a different view of the grant, holding in its second opinion (rec., pp. 140-141) that the quantity had never been located within the boundaries established by the survey of the grant, and therefore that the grant was not located within the meaning of the Gadsden treaty, and rejected the grant on that ground. Defendants were allowed an appeal, and duly prosecuted same to this court.

SPECIFICATION OF ERRORS.

The court erred in holding that the grant was one of quantity and not one of the whole tract surveyed, and in holding that it had not been located as required by the Gadsden treaty of 1853.

POINTS AND AUTHORITIES.

I.

The title-paper of this grant shows:—

1. That the whole of the tract was petitioned for.
2. That the whole of the same tract was ordered to be surveyed.
3. That the whole of the same tract was surveyed.
4. That the whole of the same tract was appraised.
5. That the whole of the same tract was ordered to be put up at auction for 30 consecutive days.
6. That the whole of the same tract was put up at auction for 30 consecutive days.
7. That the whole of the same tract was sold and conveyed in fee to the purchasers.

See title-paper.

II.

The juridical possession delivered of the land in pursuance of the survey and designation of the limits of the grant by the landmarks established by the survey, shows that the grant was one of a tract by the specific boundaries established by the delivery of such juridical possession.

U. S. *vs.* McLaughlin, 127 U. S. 428.
U. S. *vs.* Armijo, 5 Wall. 444.
Higueras *vs.* U. S., 5 Wall. 827.

Alviso *vs.* U. S.,8 Wall. 337.
Hornsby *vs.* U. S., 10 Wall. 224.
Cameron *vs.* U. S., 148 U. S. 301.
Pico *vs.* U. S., 5 Wall. 536.
More *vs.* Steinbach, 127 U. S. 70.
U. S. *vs.* Sepulveda, 1 Wall. 104.
U. S. *vs.* D'Aguirre, 1 Wall. 311.
Graham *vs.* U. S., 4 Wall. 259.
Van Reynegan *vs.* Bolton, 95 U. S. 33.
Carpentier *vs.* Montgomery, 13 Wall. 480.
U. S. *vs.* Hancock, 133 U. S. 193.
Maxwell Land Grant Case, 121 U. S. 325, 369, 373.

III.

The grant under consideration was one in fee, vesting a complete and perfect title, and necessarily conveyed a tract which was designated by specific boundaries, viz., the tract described in the survey, and not a quantity of land to be afterwards designated.

U. S. *vs.* Watkins, 97 U. S. 219.
Carpentier *vs.* Montgomery, *supra.*
Gonzales *vs.* Ross, 120 U. S. 605, 626.
Hancock *vs.* McKinney, 7 Tex. 384.
Cavazos *vs.* Trevino, 6 Wall. 773.

IV.

The natural and permanent objects embraced in the calls of this grant control the course and distance and estimated contents, and the calls to include the natural objects must prevail over a mistaken distance called for to reach the objects.

McIver *vs.* Walker, 4 Wheat. 444; 9 Cranch. 173.
Croghan's Lessee *vs.* Nelson, 3 How. 189.
Morrow *vs.* Whitney, 95 U. S. 551.
Jackson *vs.* McConnell, 19 Wend. 175.

V.

The laws set out in the title-paper of this grant, under which the grant was made, provide only for sales of land by specific boundaries after a survey of such lands and the establishment and designation of the landmarks and boundaries designating and bounding the land.

See translations of said laws.

VI.

This grant was located under the Gadsden treaty at the time of the treaty.

See authorities as above.
Stoddard *vs.* Chambers, 2 How. 284.
Bissell *vs.* Penrose, 8 How. 317.
Snyder *vs.* Sickles, 98 U. S. 203.
Scull *vs.* U. S., 98 U. S. 410.
U. S. *vs.* Miranda, 16 Pet. 153.
U. S. *vs.* Lawton, 5 How. 10.

VII.

This grant is duly recorded in the archives of Mexico.

U. S. *vs,* Osio, 23 How. 273, 279.
U. S. *vs.* Cambuston, 20 How. 59, 60.
U. S. *vs.* Sutter, 21 How. 170.
U. S. *vs.* Vallejo, 22 How. 416.

VIII.

It is presumed that the public officers who made this grant acted in accordance with their instructions and the law as known at the time, and the fact that the grant was made on the advice of the Mexican attorney general makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and regularly done.

Gonzales *vs.* Ross, 120 U. S. 605, 622, 623.

Mitchell *vs.* U. S., 9 Pet. 716, 742.
U. S. *vs.* Arredondo, 6 Pet. 691.

IX.

This grant was made when the central system was in force in the Republic of Mexico, when what had formerly been states were departments, and was made by duly-authorized federal officers in pursuance of the federal laws of April 17, 1837, April 28, 1839, December 24, 1840, and December 21, 1841.

See said laws as set out in argument under this point.

X.

The proceedings instituted in Mexico by one Camou were long after the treaty, and have no extra-territorial force, and especially cannot bind defendant Ainsa, who was not a party to them.

ARGUMENT.

This case is the first of its kind that has come before this Court, and as some of the points raised are presented now for the first time, they are discussed with as much fullness as their importance seems to demand. We believe the principal question is whether the grant under consideration is one by metes and bounds of the whole tract which was surveyed by the Mexican officials prior to the issuance of the title, or one of a quantity of land only, and, if the latter, whether the grant is void under the Gadsden treaty because it had not been located.

The genuineness of the grant was fully proved, the government making no point as to this (rec., p. 46), nor as to the deraignment of title (rec., p. 135). Evidence was introduced (rec., pp. 41, 47, 125, 126, 141) which we believe the Court will consider entirely satisfactory

that the grant was duly recorded in the archives of Mexico. The point raised by the government that the officers who made this grant were not authorized to do so presents, in the opinion of counsel, but little if any difficulty, and can be satisfactorily determined by a reference to the laws under which the grant was executed. The only question which the lower court took into consideration was whether the grant was one by metes and bounds, and to this point, as by far the most important in the case, the argument is first addressed. Appellants' main position is, briefly stated, that the title-paper shows that a certain tract of vacant public land lying between two other ranches was applied for by certain Mexican petitioners, and that after the usual preliminaries in conformity to law, of survey, appraisement and publication, the whole of this tract, and not an undesignated part of it only, was sold and conveyed in fee to the applicants.

I.

Appellants submit that the title-paper itself shows that the grant is one by metes and bounds. It appears from the record that in 1841 there was a tract of vacant public land lying between the Casita ranch on the south and the Tumacacori ranch, which is spoken of as being on the west, but which seems, in fact, according to the survey which was made, to have been on the north. The title-paper clearly shows, as we submit, that the whole of this tract was petitioned for, surveyed, appraised and sold. Any doubt that might arise from detached expressions in the instrument taken out of their connection will disappear when the paper is taken as a whole and analyzed. The following is presented as a complete and accurate summary or analysis of the title-paper as it is set out in the supplemental record, all the quotations being in the language of the instrument itself. It appears:

1. *That the whole of the tract of vacant public lands*

lying between the Casita ranch to the south and the Tumacacori ranch to the north or west was petitioned for.

This cannot be controverted and was conceded. The application was for "the survey of the public land denounced, after the requirements which are customary for its sale (title-paper p. 3)." The application was made before the land was surveyed and before any estimate had been made of its area. The title-paper was issued April 7, 1843, and the preamble to this instrument recites that application had been made "for the survey, etc., of 7½ sitios, etc., of land, which comprise the vacant public land situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas." But this recital was made after the lands had been surveyed and the contents of the tract ascertained as accurately as the surveying skill at the time permitted. The original application was, as above stated, made before the land was surveyed, and was for the "vacant public lands" lying between the two ranches, and not for any given quantity of land. It is clear that the intention of the applicant was to buy all of this tract of vacant public land, for he asks for its survey "after the requirements which are customary for its sale."

The Court will notice the fact that the tract was applied for with a view that the same tract should be sold, after the customary requirements. There was no application for a survey of the tract in order that part of it should be sold. The applicants had no thought of buying a part only, and the Mexican officials understood that they wished to buy the whole tract. This is shown in the opinion given by the Mexican attorney general (pp. 12, 14). After the survey, appraisement and publications had been made, the proceedings were referred to him for his opinion, and in his report he recites that the applicant requested that the public lands, the tract lying between the two ranches, which he denounced, "be surveyed for

him, with the customary formalities for its sale." This opinion will be considered more in detail hereafter, and is here referred to as showing that the understanding in the mind of both the applicant and the Mexican officials was that the sale was to be of the same tract which was denounced—not of a part of it.

2. *The whole of the same tract was ordered to be surveyed.*

The title-paper so states. "The commissioner shall execute the proper survey, appraisement and publication of the vacant public lands the parties in interest apply for," after proof "that the parties in interest need said vacant public lands and have an abundance of stock to stock them (p. 3)." "In order to proceed to the survey of the vacant public lands adjacent to the ranch of Casita," the commissioner summoned the coterminous owners, and took the information of three witnesses to prove whether the applicant "needs the vacant public lands between the ranch of Casita and that of Calabazas, and whether he and his wife have an abundance of stock to stock them (pp. 4, 5)."

This point cannot be controverted. The above language explicitly shows that the survey was to be of the "vacant public lands the parties in interest apply for." And not only was the survey to be of these vacant public lands, but, in addition, the appraisement and publication were ordered to be of the same "vacant public lands the parties in interest apply for." The attention of the Court is especially called to this fact, that the appraisement and publication were to be of the lands applied for, that is, of the whole tract, for, as we shall show hereafter, this fact, in our opinion, absolutely removes any doubt as to how much land was sold and conveyed by the grant.

3. *The whole of the same tract was surveyed.*

Coming to the survey, the title-paper shows that the whole of the same tract was surveyed. The commis-

sioner who was ordered to make the survey reports (p. 7) that on November 24, 1841, he "proceeded to the survey of the vacant public lands," and he records the survey in detail, the location of each monument and corner being accurately and minutely described (pp. 7, 8). Taking as a starting-point the north cross monument of the ranch of Casita, the commissioner, accompanied by his assistants and the coterminous owner of the Tumacacori grant, measured and counted 295 cords north along a public road until they arrived at a place called Nogales, where the party stopped for the night. From this point, on November 26, "they went measuring and counting along said high road 45 cords, which, together with those measured on the 24th of this month, make 340, which ended on the high road, in a flat, where a wide canyon that comes down from the slope of the Pajarito mountains terminates, and there I ordered the party to place a monument, that of Calabazas being about 1,000 steps further on, on a high hillock which slopes down on the other side of said canyon. At this place the compass was set up to determine the courses, from which operation and from examination of the titles of Calabazas, and also from the information of several individuals, I was convinced that here was the limit of the lands of the mission." The other monuments were then located as follows:

"Having asked the party how he wanted the land squared, he replied that he wanted 20 cords to the east; and thereupon they were measured for him 22 cords from the monument which is in the high road, in a straight line guided by the compass, to a hillock that has many oak trees on its slope, and on the summit a pile of stones was placed as a monument. Having returned to said cross monument on the high road I set up the compass in good adjustment, and by it directed myself towards the west, where I went measuring and counting 50 cords until I reached very broken ground, which it was impossible to measure with the cord, for which reason I made a scrupulous estimate, together with my assistants, of 150 cords, until I arrived to

where the Pajarito mountains turn to the north near the place they call Calaveras, said Pajarito mountains having been crossed and within the land surveyed, and there I ordered the party to place a pile of stones as a corner monument.

"Thus the north boundary was closed with 222 cords from the west corner monument to the east corner monument, and is limited by the lands of the mission. And having returned to where I began the survey, which is the north cross monument of Casita, I set up the compass in good adjustment and stretched the cord toward the east with 22 cords, which ended upon some hillocks at the trunk of an oak tree, where a pile of stones was placed. And having returned to said cross monument I set up the compass in good adjustment, and by it there were measured and estimated in several stretches of rough ground, toward the west, 200 cords, which ended on a whitish ridge that has considerable pasture, near the so-called Planchas de Plata, which ridge divides the streams that flow toward the ranch of Agua Caliente and those that go towards Agua Zarca. Thus the south boundary was closed with another 222 cords and is limited there by the ranch of Casita. In this manner was terminated the survey of the vacant public lands, which include 7½ sitios, and the party, when it was made known to him, was satisfied and understood the area it incloses and was warned to place, at the first opportunity, fixed monuments of stone and mortar; and in witness thereof he signed with me, the agent of Reverend Father Friar Antonio Gonzalez, the assistants who know how and my attendant witnesses."

The width of this tract of vacant public lands was 222 cords from east to west, and the height from south to north had already been ascertained as 340 cords, and "in this manner was terminated the survey of the vacant public lands." The area of this tract was found by multiplying the height by the width. These measurements reduced to varas and multiplied one by the other give an area of 188,700,000 square varas, which make 7½ sitios and two caballerias, a little short. When the area of the tract was thus ascertained and made known to the denouncer, he "was satisfied and understood the area it incloses, and

was warned to place at the first opportunity fixed monuments of stone and mortar."

Appellants submit that it is apparent and self-evident that at the time this grant was made it was thought by the Mexican officials and the interested party that the area of the tract which had thus been denounced and surveyed was 7½ sitios and no more. The Mexican attorney general, to whom the proceedings of survey, appraisement and publication were referred, goes into them with great care and computes the area of the surveyed tract, and reports it as containing 7½ sitios and two caballerias, a little short (p. 13). His care is shown by the fact that he corrects an error which had been made "in adjusting the area of the public lands surveyed," and gives the correct area by adding the "two short caballerias which they also contain." According to the survey as made, the quantity stated was the exact area of the tract.

How, then, is there such a discrepancy between the actual area as shown by later accurate surveys and the area as computed by the Mexican officials? The reason is obvious. Part of the distances in the original Mexican survey were estimated, and those that were measured were not measured accurately, and the area of the tract is thus greater than was supposed. The title-paper shows that the northwest and southwest corners were arrived at partly by estimation, and the testimony of the witness Flipper (rec., pp. 57-69) and the field-notes and map of Oury (rec., pp. 49-55) show that these estimates fell short of the real distances, and also that the measurements between the fixed objects are too short. The title-paper recites that the height of the grant from the south cross monument to the north cross monument is 340 cords, but, as a matter of fact, that distance is now found to be 449.82 cords—109 cords greater than the Mexican surveyors supposed (rec., p. 61). The title-paper shows that the distance from the north cross monument to the northwest

monument was ascertained "by measuring and counting 50 cords until I (the surveyor) reached very broken ground, which it was impossible to measure with the cord, for which reason I made a scrupulous estimate, together with my assistants, of 150 cords until I arrived" at the northwest corner, where he "ordered the party to place a pile of stones as a corner monument." But this estimate of the distance was too short, for instead of it being 200 cords from the north cross monument to the northwest corner, it is, in fact, three times that distance (testimony of Flipper, rec., p. 63). The same error exists as to the other distances, each of which is greater than it is stated to be.

The Court will notice that there is no dispute as to the location of the tract itself. Each monument and boundary is clearly described in the survey and can be identified now. (See field-notes of Oury, rec., pp. 50-54.) The map made by Oury, facing page 126 of the record, correctly represents this tract of vacant land according to the survey, natural objects and other descriptions of the original survey made by the Mexican authorities prior to the issuance of the grant, as contained in the original title-paper thereof. (See stipulation as to this map and field-notes, rec., p. 49.) These field-notes of Oury show that starting at the north cross monument of the Casita ranch and going north he found the place mentioned in the title-paper as Nogales; that going still further north he found the ruins of an old monument which are very distinct and unmistakable, and that their location was precisely that described by the title-paper as the location of the north center monument; that he found the northeast corner monument on the highest point of a hill, at a location being in accordance with that given in the title-paper; that he found the northwest corner monument at a point which answers correctly the description of this corner given in the title-paper; that he found the southwest corner monument at a point which answers very accurately the descrip-

tion of this corner as given in the title-paper, this monument being on the only ridge which divides the currents which flow southwesterly to the old Rancho Agua Caliente from those which run to Agua Zarca, and that he found as the southeast corner monument the one well known by the settlers of the neighborhood as the southeast corner of this Nogales grant and so approved by the Mexican government. Every moument and corner called for is thus identified by and located on the Oury map.

The accuracy of the Oury field-notes and map was corroborated on the cross-examination of the government's witness, Flipper. He testified (rec., p. 67) that the place called Los Nogales is correctly or approximately designated on the Oury map as about a mile and three-quarters from the present town of Nogales; that at the place ascertained by Oury as the location of the north center or north cross monument there is a mound of earth and pebbles, with a stone marked as stated by Oury (rec., p. 61); that running east from this north cruz monument the distance indicated by the Oury map, there is a monument of loose stone on a hill, this being the monument taken by Oury as the northeast corner; that he (Flipper) had never been to the northwest corner, but that the place where the end of the Pajarito mountains subsides towards the north is north of the international boundary line, and that the Oury map more or less correctly represents these mountains as they run north, but that he (Flipper) could not locate them accurately, as he had never surveyed them or been there (rec., p. 67); that running west from the south cruz monument the distance designated on the Oury map, he (Flipper) found a monument built on a point of a ridge at the place called the southwest corner (rec., p. 68); that running from the south center monument the distance on the Oury map measured to the southeast corner, there is a monument of stone and mortar; that he did not know the

location on the earth's surface of the northern boundary of the Casita ranch.

The correctness of this Oury map is established, as we submit, not only satisfactorily but conclusively. The places where the monuments are located answer in each instance to the topography described in the title-paper. For instance, the title-paper describes the north cross monument as being "in a flat, where a wide canyon that comes down from the slope of the Pajarito mountains terminates," the monument "of Calabazas being about 1,000 steps further on, on a high hillock which slopes down on the other side of the canyon," and as to the ruins of the monument at this place Oury reports (rec. p. 50) that they "are very distinct and are unmistakable. "Their location, furthermore, is precisely that described "by the 'expediente.' They are at the point where a "wide wash, now known as the Juan Antonio, empties "into Potrero creek, and south 27° 40′ west 51.05 chains "or about 1,123 yards distant from a large and old mon-"ument of loose rock located on the top of a high hill "which ends directly ahead of said Juan Antonio wash. "Furthermore, the Juan Antonio wash is the first wide "canyon descending from the Pajarito mountains which "empties into Potrero creek (along which the Tubac "road runs) after leaving the point referred to in the "'expediente' as Los Nogales, Russell canyon being the "next one which does so, emptying at a point about two "miles still further north along said road."

As to the northeast corner monument Oury states that "it is located on the highest point of a hill, the only "one within 1½ miles easterly from the north cruz monu-"ment, which has many oak trees on its side still stand-"ing and a great many stumps of trees recently cut down. "The location of this monument being in accordance with "that given in the expediente, I accept it as the north-"easterly corner of the claim."

As to the northwest corner monument, his statement is that "as the monument at Calabasas pass is the only "point which answers correctly the description of the "northwest corner of the claim given in the expediente, I "accept it as such."

The southeast corner monument is the one commonly known by the settlers as the southeast corner of "Los Nogales de Elias," and so approved by the Mexican government.

The southwest corner monument is located as follows: "It is located on a whitish ridge which divides the "currents which flow southwesterly to the old Rancho "Agua Caliente from those which run to Agua Zarca, "adjacent to the old mining camp of Planchas de Plata, "and easterly from it about one and one quarter mile dis- "tant. This answers very accurately the description of "the southwest corner of the claim given in the expe- "diente, and it may be added that its location on a 'whit- "ish ridge' is of singular importance in view of the fact "that all the other hills and ridges over which this line "passes are of a decidedly dark volcanic rock. Besides, "there is no other ridge which divides the currents as "above stated; hence I accept this as the southwest cor- "ner of the claim."

The monuments established in the original survey of this grant could not be identified more clearly than they were by Oury, and his map must be taken as a correct representation of the tract of land described in the title-paper.

4. The whole of the same tract was appraised.

The communications from the superior chief of the treasury to the commissioner (title-paper, pp. 2, 3) inclosed the proceedings by the interested parties "for the survey, appraisement and publication of the vacant public lands which they say they need," and the commissioner was instructed to "execute, in separate proceedings, the

proper survey, appraisement and publication of the vacant public lands the parties in interest apply for." It is thus apparent that the appraisement and publication were to be of the same lands which were surveyed. After the survey was finished the commissioner reports (rec., p. 9) that "having already completed the survey of the vacant public lands," he ordered "that the appointment of persons to appraise the land be proceeded with," and the land was appraised, the appraisement, as corrected, amounting to $113, one real and ten grains. After the appraisement he reports that "the sitios surveyed having now been appraised, I did order that they be published" for 30 consecutive days. The 30th publication is as follows: "The vacant public lands between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, comprising 7½ sitios for raising cattle, and surveyed for Don José Elias and Don Francisco Gonzalez, are appraised at $112 and four reals." It seems impossible to us that any one can fairly contend that the appraisement and publication were of anything but the entire tract. "The sitios surveyed" were appraised and published, and the only sitios surveyed were the whole tract. When the Mexican attorney general reported on the proceedings he stated (p. 13) "and finally, having had the public crier advertise said surveyed public lands for 30 consecutive days in solicitation of bidders, and none having appeared, the commissioner concluded the proceedings." The English language could not be framed to contain a clearer statement that it was the "said surveyed public lands" which were advertised, that it was the "sitios surveyed" which were appraised and ordered to be published, and which were in fact advertised, as stated by the attorney general. The Court in reading this argument may wonder why we dwell on this point of appraisement, when the fact that the whole tract was appraised seems to be as clear as words can make

it. Our reason is that the appraisement absolutely determines the fact that the whole tract was finally sold, as we shall show later, and realizing this the counsel for the government try to make it appear that something less than the whole tract was appraised.

5 and 6. *The whole of the same tract was ordered to be put up at auction for 30 consecutive days, and was put up for that time.*

The proof of each of the foregoing points has been given. It was the "said surveyed public lands" which were offered for 30 days.

7. *The whole of the same tract was sold and conveyed in fee to the purchaser.*

After the 30 publications of the "vacant public lands between the north boundary of the ranch of Casita," etc., had been made, the commissioner ordered the parties in interest to be present at Ures "at the sale of said public lands," and the applicant appointed an attorney to proceed "in the matter of the ranch of Casita and the adjacent public lands which were surveyed," trusting that the attorney would "be present at the last three public offers and sale to be made of said public lands to receive the title and make the corresponding payment (pp. 11, 12)." We invite the attention of the Court to this language. The government urges that only 7½ sitios, etc., were sold, but here is the direct statement, susceptible of no ambiguity and not possible to be misapprehended, that the parties were to be present "at the sale of said public lands." To maintain that the sale was not "of said public lands" but of a part of them only is, we think, an attempt to claim that the language does not mean what it says. We rely on the instrument as it is written. Our contention is that it means what it says—that the "sale of said public lands" means only one thing, the sale of the tract of public lands which had been surveyed, appraised and published for 30 days.

The three public offers and sale were made. At the last of the offers, the board of sales having assembled, the crier announced (pp. 15-16) "'There are going to be sold on account of the public treasury of the department 7½ sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas in the upper Pima country, in favor of José Elias and his parents, and appraised at $113, one real and ten grains. Whoever wishes to make a bid for said land, come forward and make it to this board of sales, where the bid made in accordance with the laws on the matter will be received, with the understanding that the sale is to be made to the highest bidder.' Thereupon Ignacio Santos Elias, in the name and as the agent of Don José Elias and his parents, came forward and again offered for his principals the $113, one real and ten grains, in which the land was appraised," and the land was sold. "In these terms this act was terminated, and there were publicly and solemnly sold the 7½ sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the jurisdiction of the town of Imures, for the sum of $113, one real and ten grains in which they were appraised."

This is in terms a sale of the land "comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas." It was a sale of the whole of this tract, and its area was stated as 7½ sitios, etc., because that was what the survey showed it to be. All parties believed that it contained this quantity exactly, and after its area had been ascertained by the survey it is spoken of either as "the 7½ sitios which the vacant public lands contain (p. 9)" or as "the vacant public lands between the north boundary

of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabasas, comprising $7\frac{1}{2}$ sitios, and surveyed for" the applicants (p. 10). Why was the exact quantity of $7\frac{1}{2}$ sitios and two short caballerias of land mentioned as the amount of land sold? The answer is, of course, apparent, and is, as stated in the report of the Mexican attorney general, because this was, according to the measurements and estimates of the survey, the exact "area of the public lands surveyed."

Appellants cannot admit that there is any doubt that can be reasonably entertained as to how much land was sold. All the proceedings from first to last refer to the whole of the tract of land between the two ranches and to nothing else. There is not a word or suggestion that part of this tract was to be sold and the remainder reserved. If there were a doubt as to how much land was sold in this final sale, there is one fact, which has heretofore been pointed out, that makes it absolutely certain—and this strong language is used advisedly—that the whole tract which had been surveyed was sold. That fact is that the land which was thus sold was the land which had been appraised, and the land which was appraised was the whole tract which had been surveyed. "The sitios surveyed" were appraised. The "said surveyed public lands" were appraised and offered for thirty days. The attorney Santos offered the price "in which the land was appraised," and this land was sold to him. He afterwards paid the price "at which said land was sold," and title in fee was formally issued to him. Only one parcel of land, viz., the entire tract, is referred to in the proceedings. The Mexican attorney general gives in his report a full resumé of the proceedings. He recites that the board of the treasury ordered that "the public lands the applicant denounced be surveyed for him, with the customary formalities for its sale;" that it was proved that the applicants "need the public lands they have registered,

and also have sufficient live stock to stock them;" that the commissioner proceeded "to the survey of the vacant public lands already mentioned, situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabasas, the result being that they contained 340 cords from north to south and 222 from east to west, which, reduced to varas and multiplied one by the other, give an area of 188,700,000 square varas, that make 7½ sitios and two caballerias, a little short, for raising cattle;" that the oath was administered to two persons "as appraisers of said public lands," and that "the total value of said lands should be $113, one real and ten grains;" that the public crier advertised "said surveyed public lands" for 30 consecutive days, and the attorney general concluded by recommending "that the treasury make three public offers of said 7½ sitios and two short caballerias of public land for raising cattle and horses, included between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, to which these proceedings refer," and that title be issued to the highest bidder upon payment of the value of said lands.

Thereupon the treasurer general ordered that the parties "proceed to the three customary public offers for the sale of the lands to which these proceedings refer," which was done. If there were any doubt as to what land the proceedings referred to, it would be removed by the prior statement of the treasurer general, in which, on November 25, 1842 (p. 12), he made an order that there should be a "report to the superior board of the treasury of the foregoing proceedings on the survey, appraisement and publications of the vacant public lands of the ranch of Casita surveyed for" the applicants. Here is the direct statement that the survey was of the vacant public lands, the appraisement was of the same public lands, and the

publication also of the same tract. The proceedings referred to the tract of vacant public lands, and it was this tract, and the whole of it, for none is excluded, which was ordered to be sold.

It seems as clear and conclusive to the undersigned as a mathematical demonstration that it was the vacant tract between the two ranches which was appraised and sold. The language can have no other meaning. The statement is made that this tract was "composed of 7½ sitios," etc. A later survey shows that it contains more than this, and that the measurements and estimates of distances made by the Mexican officials were inaccurate. On account of broken ground which, as the field-notes of the survey state, "it was impossible to measure with a cord," the distances to certain monuments and corners were calculated, as heretofore shown, and it is now found that the distances are greater than the Mexican officials estimated. Regarding the inaccuracy of Mexican surveys, this Court said in U. S. *vs.* Billings, 2 Wall. 444, at page 447, "perhaps the province of California at that time (1839) could not furnish a man capable of making an accurate survey," and this was doubtless just as true of the province of Sonora in 1841; and the court said in Noe *vs.* U. S., 1 Hoff. Land Cases, 162, 169, referring to an estimate of the contents of a tract of land: "This is perhaps as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country." It is notorious that the quantity of land within the natural boundaries of Mexican grants often far exceeded the estimate of the surveyor, but this circumstance could not restrict the language of the grant or change the boundaries. (White *vs.* Burnley, 20 How. 247.) But however erroneous the estimate of distances, and, consequently, of the area of the grant, there is no possible doubt of the location of the

tract itself, for all the monuments are specifically designated in the calls of the title-paper, and are as easily located now as when the grant was issued. The tract was, according to the estimates and measurements of the survey, supposed to contain only 7½ sitios and two short caballerias, and was spoken of as containing only this much. The fact that years afterwards it is found that the measurements were inaccurate, and the area is greater than at first supposed, only makes it one of the innumerable cases where similar mistakes were made, and where the familiar rule applies that courses and distances and estimated contents must give way to natural, permanent objects called for in the deed.

What these officials should have done is one thing: what they did do is another. They should have made the measurements with exact precision—assuming that they had the skill to do so. If they had done this, instead of informing the grantee that the tract surveyed contained 7½ sitios, they would have stated its contents accurately, and the grantee would have paid for the amount of land that the tract actually contained, and the proceedings would have thus been free from any error or mistake. This is what they should have done. What they did do was to survey the tract to the best of their ability, stating its contents as correctly as lay in their power.

We submit that it must be held under the authorities that where the clear intention of the parties is thus apparent to sell a given tract as surveyed, greater regard must be had to this clear intent than to any particular words which may have been used in the expression of that intent (Field *vs.* Leiter, 118 Ill. 17), and it seems unusual that the court below should have ignored the intent of the parties and dwelt entirely on the few words designating the estimated contents of the tract. The instrument must be taken as a whole, and when it is discovered that the

expression of quantity is incorrect, this must yield to the natural objects. As to the corners, it was impossible to get them wrong, for they are permanent natural objects; whereas, as to the quantity, it was impossible to get it right, for, as stated in the paper, parts of the ground were so broken that it was "impossible to measure it with a cord." What is more rational than to say, as is shown by later surveys, that they got the quantity wrong, but that this mistake does not vitiate as long as the tract is clearly designated by the landmarks? As this grant describes the land conveyed by well-defined metes and bounds, and states also the number of sitios contained therein, the more certain description by boundaries must govern the description of the calls, and as there is not the slightest fraud in the proceedings, both grantor and grantee took the risk as to the quantity of land.

II.

In the second place, juridical possession was delivered in this grant, and this established the boundaries. The effect of delivery of juridical possession has been so many times decided by this Court that the court below greatly erred, as it seems to counsel, in overlooking the decisions. The title-paper shows that a careful survey, the details of which are given above, was made of a tract of land; that the corner monuments and cross, or side, monuments, were designated, and that the grantees were enjoined to put at such monuments or landmarks "fixed monuments of stone and mortar," and juridical possession of the land was thereupon delivered in pursuance of such survey and designation of monuments. We urge that it is manifest that such juridical possession determined the limits and extent of the tract granted. The cases so hold uniformly. In U. S. *vs.* Pico, 5 Wall. 538, a concession was made in California in 1841, under the colonization laws of the Mexican Republic, and after

designating the tract ceded the resolution of approval added "in extent twelve square leagues." In fact, the tract contained an area of twenty square leagues. Counsel for the government urged in that case that the words "in extent twelve square leagues" created a limitation upon the quantity granted, but this Court held otherwise, and Mr. Justice Field in delivering the opinion said:

"It is evident, however, that the words are not used for any such purpose, but merely indicate a conjectural estimate of the quantity. The concession of the governor, with its specific description, is referred to in the proceedings of the assembly, and is stated to have been made in conformity with the requirements of the law. No objection is suggested to the boundaries given, nor is an intimation made of any intention to exclude from the concession any portion of the land they embrace or to restrict the concession in any particular.

"When, in Mexican grants, boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used. Thus, in the Fremont case, the boundaries embraced many leagues more than the quantity intended to be granted, and the grant provided for the measurement of the designated quantity and the reservation of the surplus. In the absence of terms of similar import, the extent of the grant is only subject to the limitation upon the power of the governor, imposed by the colonization law of 1824. Were there any doubt of the intention of the governor to cede all the land contained within the boundaries designated by him, it would be removed by the juridical possession delivered to the grantees.

"This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government.

"Such is the purport of the recent decision in Graham *vs.* United States, 4 Wall. 260. In that case the survey made by the Surveyor-General of the grant confirmed did not conform to the measurement of the land as shown by the record of juridical

possession, and the District Court for that reason set the survey aside and ordered a new survey, which should correspond with the measurement, holding that the action of the officers of the former government upon the delivery of possession furnished insuperable objections to any other course. In affirming this decision, this Court expressed its concurrence with the views of the District Court, and held that a proceeding of this character must control the officers of the United States in the survey of lands claimed under a confirmed Mexican grant. In other words, the case decided that juridical possession was conclusive as to the boundaries and extent of the land granted."

This reasoning applies directly to the present grant. There are no words in the title-paper providing for the "measurement of the designated quantity and the reservation of the surplus," because, as we submit, no such proceeding was known to the laws of Sonora, and consequently no limitation upon the quantity embraced within the boundaries could have been intended. Juridical possession of all the land within the designated boundaries was delivered to the grantees, with the ascertainment and settlement of the boundaries of the land. This is stated in the granting or concluding part of the grant in so many words. The grantees were "cautioned to restrict and limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," and to observe the provisions of the law "which imposes on them the obligation to maintain at their boundary termini monuments of stone and mortar."

The language of this Court in Graham *vs.* U. S., 4 Wall. 259, above cited, is that "By this proceeding—called in the language of the country the delivery of juridical possession—the land granted was separated from the public domain, and what was previously a grant by quantity became a grant of a specific tract."

The argument on this point may be put in the shape of a syllogism, thus: where juridical possession was

delivered the boundaries were ascertained and the grant was of the specific tract; juridical possession was delivered in this case; therefore this grant is of a specific tract.

In the San Rafael de la Zanja grant, which was before this Court in the case of U. S. *vs.* Cameron, 148 U. S. 301, Mr. Justice Brown in delivering the opinion of the Court said, at page 309: "While a grant of four square leagues of land in the place called San Rafael de la Zanja, standing alone, would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be designated by landmarks of stone and mortar; that such designation was actually made; and that juridical possession of the land was delivered in pursuance thereof; it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries, as these grants are distinguished in United States *vs.* McLaughlin, 127 U. S. 428." The Court did not decide this question, as it was not necessary to the decision, and there was in the San Rafael de la Zanja grant as the Court thought, "an apparent discrepancy between the terms of the grant and the survey that was made in pursuance of it, which may perhaps be susceptible of elucidation." But in this Nogales case there is no such apparent discrepancy. Juridical possession was delivered in pursuance of the survey which had been regularly and carefully made, and under the uninterrupted holdings of this Court this made the grant one of a specific tract.

The attention of the Court is respectfully invited to the Maxwell Land Grant case, 121 U. S. 325, in which Mr. Justice Miller in delivering the opinion points out at pages 369, 373 the difference between grants by quantity and grants by specific boundaries. The Beaubien and Miranda grant described by specific boundaries the land petitioned for, and was held to be a grant of the whole tract. The Court said that "the phrase 'out-boundary' has

its proper use in regard to certain classes of Mexican grants, but it is wholly inapplicable and misleading as referring to the one now under consideration." We submit that it is just as inapplicable and misleading in this Nogales case, and that it is just as clear in this case as in the one just quoted from that "there is nothing in the language of the grant, nor in the petition, nor in anything connected with it, nor in the act of juridical possession, to indicate that anyone had any idea or conception that the grantees were not to have all the land within the boundaries established by that juridical possession." The grantees were told that the boundaries established by the "hereinbefore inserted proceedings of survey" were "their boundaries," which can mean only that such boundaries were boundaries of the land bought by them, and it was because their land extended to such boundaries that they were compelled to erect at their boundaries monuments of stone and mortar.

The title-paper sets out very clearly the facts constituting the delivery of juridical possession. The boundaries of the land granted were ascertained and settled by the proper officer of the Mexican government, viz., the commissioner, who was specially designated for that purpose. The applicants for the tract of vacant public lands were themselves the owners of the coterminous land to the south, the Casita ranch, and the agent of the owner of the coterminous land to the west or north was summoned and went with the surveying party. He pointed out the monuments of his land, and signed the proceedings of survey, together with the commissioner, the interested parties, the assistants and witnesses (p. 8). The record of these proceedings was kept and an authentic copy is contained in the title-paper furnished the grantee. After these preliminaries of measurement and survey, possession of the tract of land which had been segregated by the survey from the public domain was delivered to the grantees, as set out in

the granting part of the title-paper. This title-paper shows that all the requisites constituting a delivery of juridical possession were complied with. The facts as to juridical possession in this grant are the same in every essential and even in every literal respect as in the grant before this Court in Cameron vs. U. S., 148 U. S., *supra*, where the Court said at page 309, top, that juridical possession of the land was delivered in pursuance of the designation of the limits, and this Cameron case is relied on as a direct authority that juridical possession was delivered in the case now under consideration, and that this fact shows that this Nogales grant is one by specific boundaries and not one by quantity. The proceeding of delivery of juridical possession involved, as laid down by Field, C. J., in delivering the opinion of the court in one of the early cases (Leese *vs.* Clark, 18 Cal. 535, 574) "a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement—in other words, a location of the land." This doctrine has never been departed from or questioned. While some points of the case now before the Court are new, the one of the effect of delivery of juridical possession is not. This delivery, we submit, established the boundaries of this Nogales grant according to the survey made. The land granted was located by the survey. The delivery of juridical possession makes it impossible to consider it a grant by quantity.

III.

There is a short course of reasoning which we believe is, under the decisions of this Court, conclusive that this grant was one of the specific tract embraced in the survey. This reasoning is based on the proposition that the grant conveyed the fee by a complete and perfect title, and from this that it must be a grant of a designated tract of land. That the grant conveyed the fee appears from

the granting clause of the grant, where the treasurer general in the name of the Mexican nation "cedes, gives and adjudicates said lands, by way of sale, and with all the requisites, stability and permanence the laws establish, for themselves, their children, heirs and successors, with all their entrances and exits," etc., so that the grantees, their children, heirs or successors should not be "in any manner disturbed, annoyed or molested in the free use, exercise, ownership, dominion and possession of said 7½ sitios and two short caballerias of land, comprising the vacant public lands between the boundaries of Casita and those of Tumacacori and Calabazas," "so that they can in this manner freely possess, enjoy, hold, sell, exchange, barter, donate, transfer, cede and alienate said 7½ sitios and two short caballerias of land, at their free election, as absolute owners and proprietors of said lands." (Title-paper p. 18).

It needs no argument before this Court to show that this language conveyed the fee. In Williams *vs.* U. S., 92 U. S. 457, this Court held, at page 460, that similar language conveyed the fee. This Nogales grant presents every link in the chain of a perfect title. Nothing remained to be done to consummate the title to the grantee. The land had been surveyed, monumented, appraised and auctioned off to the highest bidder. The money had been paid, and the final title had been issued and recorded, investing the purchaser with the fee. This grant is like the one passed on by this Court in U. S. *vs.* Watkins, 97 U. S. 217, which the Court pronounced to be a complete and perfect title to the land described by certain metes and bounds, according to a survey and sale thereof which had previously been regularly made. A similar grant in fee by sale by metes and bounds is the one passed on in Cavazos *vs.* Trevino, 6 Wall. 773.

This title being in fee, and juridical possession having been delivered, it necessarily follows, as above stated,

that the land granted must have been separated from the public domain prior to the issuing of the title. As said by this Court in Carpentier *vs.* Montgomery, 13 Wall. 430, at page 481, "In every complete grant conveying a perfect title, it is essential that the thing granted be sufficiently described to enable it to be identified. To constitute a complete and perfect title to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions, not only that a specific parcel was intended to be granted, but it must also be described so that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed."

So, we submit that the ruling of the court below involves a contradiction in terms. As pointed out in Hornsby *vs.* U. S., 10 Wall. 224, at page 241, the interest which passed to the grantee under an imperfect or floating grant, or grant by quantity, was either a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or was a mere equitable or inchoate title. The title to a grant by quantity was never, as we most confidently urge, a grant in fee with designated boundaries fixed by a prior survey, as this grant is, and the fact that this grant is one in fee with such boundaries shows conclusively that it was not a grant by quantity. Being a complete and perfect title, it must be of the tract embraced in the survey. This is laid down by this Court, among other cases, in More *vs.* Steinbach, 127 U. S. 70, at page 79, where the Court say that before an indefeasible title could vest in the grantee under a Mexican grant "a formal transfer of the property to the grantee by officers of the government was necessary. The proceeding was termed a judicial delivery of posses-

sion. Until it was had the grant was an imperfect one. As preliminary to or as a part of the official delivery, the boundaries of the land were to be established, after summoning the neighboring proprietors as witnesses to the proceeding. Malarin *vs.* U. S. 1 Wall. 282, 289."

In the Malarin case, *supra*, Mr. Justice Field in delivering the opinion of the Court goes on to say (p. 289): "When the grant to Pacheco was issued there still remained another proceeding to be taken for the investiture of the title. Under the civil as at the common law a formal tradition or livery of seizin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established when there was any uncertainty in the description of the premises. Measurement and segregation in such cases therefore preceded the final delivery of possession."

Final delivery of possession was made in this Nogales case. This fact cannot be controverted, and we confidently rely on the above quoted language of this Court as showing that this final delivery of possession must have been preceded by a measurement and segregation of the quantity granted. The court below in holding that the final delivery of possession was of a quantity which had not been measured and segregated seems to be squarely in conflict with the decisions of this Court.

We urged in the court below, as we do now, that a sale of an unsurveyed quantity of land, to be designated or located by proceedings subsequent to the sale, was unknown to the laws of Sonora under which this sale was made, and we referred to the laws of 1825 and 1834 as showing that they contemplated only sales of land according to a prior survey. The court below in its opinion say "of necessity the exact location was to be determined by some subsequent action of the parties." But this is a misconception of the laws of Spain and Mexico. A location by any acts of the parties was entirely

unknown to the Spanish law. This Court in U. S. *vs.* Armijo, 5 Wall. 444, quote, at page 449, the law of Mexico as stated by Galvan that "No person, though his grant be older than others, can take possession for himself, or measure or set limits to his landed property, unless it is done by judicial authority, with the citation of all those who bound upon him; for whatever is done contrary to this will be null and of no validity or effect;" and this Court said in U. S. *vs.* Smith, 10 Pet. 326, at page 335: "Spain never permitted individuals to locate their grants by mere private survey." The same doctrine is announced in Hornsby *vs.* U. S., *supra*. It is thus clear that the parties could not, as the court erroneously held, determine the exact location by "some subsequent action on their part," and it is equally clear that the Mexican government intended no further location, because title had been issued in fee, and the grantees were enjoined to "limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey"—not to boundaries to be afterwards designated. These boundaries, as we have heretofore shown, had been established by the proper officials of the government. The owners of the adjoining lands had been summoned, the very object of this being to fix the boundaries of the land granted, and to let the neighboring owners know where the boundaries were. In view of all this the opinion of the court below that any further boundaries were to be fixed by either the parties or the government must, we think, be rejected. No such proceeding was known to the Mexican law.

If there were any doubt as to how much was sold, the practical interpretation of the parties themselves is entitled to great, if not controlling, weight (Topliff *vs.* Topliff, 122 U. S. 121), and this practical interpretation was that the grant extended to the corner monuments, for it is expressly stated that the party was ordered to put at

the corners "a pile of stones as a corner monument," "and was warned to place at the first opportunity fixed monuments of stone and mortar," and that the grantees "must limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," "maintaining at their boundary termini monuments of stone and mortar." And yet the court below held that this grant had not been located, and that there are no boundaries to the grant, and this in the very teeth of the above language that the boundaries had been established and the grantees were to confine themselves within such boundaries.

To adopt this view, that there was simply a mistake in the measurements, and that the whole tract of vacant lands, containing, as was supposed, 7½ sitios and two short caballerias, was sold, conforms to the laws of 1825 and 1834, providing for sales of land according to a survey, and accords also with the language of the papers, while the theory that the whole tract was applied for, the whole tract appraised, the whole tract offered at auction for 30 days, the whole tract ordered to be sold at the last three public offers, but only part of the tract actually sold and the excess reserved, violates the law, which knew nothing of a sale of an unsurveyed quantity, contradicts the language of the papers, and is, with due respect it is said, an impossibility, if not an absurdity, for the following very evident reason: the survey was supposed to be correct, the applicant was informed that the tract was composed of 7½ sitios, "and he was satisfied and understood the area it incloses," and everyone, officers and parties, acted on the theory—for there was absolutely no other light before them—that the surveyed lands contained only the quantity stated. Therefore, in speaking of this quantity they spoke of the whole tract, and in selling this quantity they sold the whole tract, the quantity and the tract being spoken of as one and the same thing. As the

tract was supposed to contain 7½ sitios and two short caballerias, and no more, how can any one say that the officials intended to sell this quantity and reserve the excess within the boundaries, when no one thought there was any excess? To say so is a contradiction in terms. The court below say "the intent to reserve to the government the excess over the amount granted within the boundaries is as clearly manifested as it could have been made by a reservation in express language." But, on the contrary, no such intention could by any possibility have been in the minds of the Mexican officials, for the reasons above stated. How can they be thought as sane men to say to the grantee "This survey shows that the area of the surveyed land is exactly 7½ sitios and two short caballerias, and we will sell you this amount and reserve the balance or excess?" What excess? There was no excess so far as they knew, and therefore none could have been in contemplation. They must have intended to sell the entire tract, as the language of the grant shows they did.

If there had been any excess and it had been proposed to reserve it, this could have been done in California, where the grants by quantity provided for a subsequent survey of the quantity called for, "reserving the balance to the nation for its convenient use," but there are no words of reservation in this grant, and, as we shall endeavor to show, could be none, for the Sonora law never contemplated any such grant of an unsurveyed quantity and reservation of an excess.

The cases of U. S. *vs.* Pico, 5 Wall. 536, above quoted from, and U. S. *vs.* D'Aguirre, 1 Wall. 311, are quite similar to the present case. In the D'Aguirre case, two previous grants had been issued for grants situated within a tract known as the "Rancho of Old and New San Jacinto," and a surplus still remained. For this surplus a petition was presented, and to the description of the land which it gives these words were added, "the extent of

which is about five leagues, more or less." This Court held that the petition was for the grant of a specific tract, not for any particular quantity, and that the words "about five leagues, more or less," constituted a mere conjectural estimate of the extent of the surplus.

This reasoning applies directly to the present case. The petition was for a grant of a specific tract, the sale was of the land petitioned for, surveyed and appraised, and the statement of the quantity, based partly on measurements and partly on conjectures or estimates of distances, now but not then known to be erroneous, cannot control the establishment of the boundaries and the juridical possession delivered in pursuance of the survey.

The Pico case, above cited, seems to be a precedent, controlling the case now under consideration. In that case juridical possession was given to the grantees when the land was measured. Afterwards the concession was approved by the departmental assembly, the resolution of approval, after designating the tract ceded, adding "in extent twelve square leagues," and these words, it was supposed by counsel for the United States, created a limitation upon the quantity granted. But this Court pointed out, as shown in the extract hereinabove quoted from the opinion, that the words "were not used for any such purpose, but merely indicate a conjectural estimate of the quantity." "No objection was suggested to the boundaries given, nor is an intimation made of any intention to exclude from the concession any portion of the land they embrace, or to restrict the concession in any particular." "Were there any doubt of the intention of the governor to cede all the land contained within the boundaries designated by him, it would be removed by the juridical possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has

all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government."

This ruling is confidently urged upon the Court as controlling this Nogales grant. Counsel cannot see any difference in legal effect between the Pico case and the case at bar. In each case juridical possession was delivered to the grantees, in each case the quantity was merely estimated—in the Pico case by conjecture only, in this Nogales case partly by conjecture and partly by a survey —and in neither case was any objection suggested to the boundaries given nor any intimation made of any intention to exclude from the concession any portion of the land they embrace, or to restrict the concession in any particular.

After the entire tract containing the remnant of the public lands between the two ranches in this case had been surveyed and appraised, why were "7½ sitios and two short caballerias" mentioned as the extent of the land which was sold? Why were not four or five or six sitios sold? The answer is, of course, that 7½ sitios and two short caballerias were mentioned as the quantity sold because the entire tract was to be sold, and, as stated by the Mexican attorney general, the computation of the measurement of the surveyed lands showed that their area was 7½ sitios and two short caballerias. In selling this quantity they sold the tract. Nothing can be clearer.

The attention of the Court is respectively invited to the case of Cavazos *vs.* Trevino, 6 Wall. 773, as an authority that the above language of the title-paper as to the monuments and corners fixes the corners of the grant, and precludes the idea that the grant itself consists of any smaller portion of land within these monuments. In the Cavazos *vs.* Trevino case the record states that "the survey began at a watering-place for cattle, on the Rio Grande, in the southwest corner of the tract, and that the

first line ranged from it to a slough, 584 cords up the river, "which slough was left as a natural landmark" and a monument fixed. This Court approved the instruction that "the grant itself shows that a corner was established at the derrane or slough, 548 cords from the beginning corner, whence a line was run north by the tanque mentioned in the grant to a pocket or small potrero on the Laguna Madre, where another corner was established." It was taken for granted that when the grant said it established a certain place as a corner it meant just what it said, and this Nogales grant in establishing the cross monuments and corner monuments meant that these were the monuments of the tract of land to be sold.

The court below did not seem to appreciate how useless this elaborate survey was if the only effect of it was "to designate certain out-boundaries within which the quantity of land granted was to be located." We urge again, for we have the utmost confidence in the position, that such a grant within out-boundaries was unknown to the Sonora laws of 1825 and 1834, and that the object of the survey in this case was to designate, in accordance with those laws, not out-boundaries but the boundaries of the very tract sold. If out-boundaries were to be designated, it is obvious that no survey was needed, for the out-boundaries were already known, on at least two sides, as the Casita ranch on the south and the Calabazas on the north or west. But, on the other hand, if the area of the remnant between these two ranches was not known, and it was necessary to ascertain it as nearly as possible in order to fix the price of the tract, there is reason for the survey and appraisement.

IV.

No discussion is needed as to this rule or as to its application to the facts of this case. The estimated con-

tents of the tract are less than the actual contents, because the distances were not accurately measured. The discrepancy is due to this and to nothing else.

V.

Another fact showing that this grant is one by metes and bounds is found in the laws under which it was made, which provide for the sale of surveyed lands only. A grant such as the court held this to be, viz., of a certain quantity of land to be located within exterior boundaries, was the common form of grant under the colonization laws in California, but was not known to the laws of the "State of the West" (Sonora and Sinaloa). The grant recites that it was made under the provisions of law No. 30, of May 20, 1825, and of law No. 26, of July 11, 1834, and of the certain decrees enumerated in the title-papers. Appended to this brief is a translation in full of these laws. From them it will at once be seen that the lands of the state were to be surveyed before they were sold, were to be appraised after they were surveyed, and were to be sold by metes and bounds as surveyed. Article 30 of the law of 1825 provides that "It shall be the obligation of owners of sitios to place at their boundary termini the monuments of stone and mortar ordered in repeated laws, as soon as possession thereof is given them; and if within three months from the day the survey is concluded they do not do so, they shall incur a fine of $25, which the surveyor-judge shall exact of them for the public funds, and besides shall order the monuments constructed at the expense of the parties interested."

Article 63 of the law of 1834 is to the same effect. It provides that "It is the duty of owners of sitios to place upon the boundary lines of their estates landmarks of stone as ordered by the statutes, as soon as they are in possession of their estates; and if within three months, counting from the date that they received their title, they

have not complied with this regulation, they shall incur a penalty of $25, which they shall pay to the judge for the public funds, who moreover shall cause the said landmarks to be constructed at the cost of the said proprietors."

It is obvious, as we submit, that the laws of 1825 and 1834, under which this grant was made, contemplated in all cases a survey, an appraisement of the land surveyed, and a sale of the same land, and it has been seen that the granting clause of this grant refers to a surveyed tract, in providing that the grantees "must limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," observing and exactly "complying with the provisions of article 63 of the organic law of the treasury, No. 26, of the 11th of July, 1834, which imposes on them the obligation to maintain at their boundary termini monuments of stone and mortar, subject to a fine of $25, which shall be exacted of them, if they violate said law, by the proper local judge for the common funds; and said monument shall be constructed at the expense of the parties in interest." (Title-paper, p. 18.)

We most confidently invite the attention of this Court to the above-cited provisions of the laws of 1825 and 1834. The lower court held that the only effect of the survey "was to designate certain out-boundaries within which the quantity of lands granted was to be located;" but we rely on the plain language of the law to show that such an opinion is erroneous. The boundaries of the land marked in the foregoing proceedings of survey were not out-boundaries, but were, as article 63 states, "the boundaries of the estate" of the purchasers. This survey and these boundaries marked the tract sold—not a tract within which another tract was to be subsequently located. It does not appear from the opinion of the lower court that it examined these laws; if it had, we are confident it would not

have announced a conclusion so pointedly at variance with their provisions.

The court below seems to have been unaware of the difference between the manner in which lands were sold by the states of the Mexican Republic and the system of granting lands in the department of California. In California grants by quantity, or floating grants, were made by the governors. As stated by this Court in Hornsby *vs.* U. S., 10 How. 224, "Grants of the public domain of Mexico, made by governors of the department of California, were of three kinds: 1 ; grants by specific boundaries; where the donee was entitled to the entire tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by out-boundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3d, grants of places by name, where the donee was entitled to the tract named according to the limits as shown by its settlement and possession, or other competent evidence." But, as this Court has so many times stated, grants by quantity were not surveyed at the time. In a grant by quantity "the right to so much land to be afterwards laid off by official authority in the territory described passed from the government to the grantee by the execution of the instrument granting it (Hornsby *vs.* U. S. *supra*)." In the Sonora grants, on the contrary, as this title-paper shows, the land was surveyed at the time, and was sold, as we submit, according to the survey and the juridical possession delivered thereof. It is, in fact, common knowledge that the grants in the territory acquired under the Gadsden treaty are executed contracts of purchase, where the land, after certain preliminary proceedings, was put up at public auction and sold to the highest bidder, and were not voluntary grants. (Spaulding on Public Lands, Sec. 510.)

The sales of lands made by the state of Sonora were

complete and perfect titles in fee, and in this respect resemble the sales made by the state of Coahuila and Texas. If the Court will examine the grant passed on in Hancock *vs.* McKinney, 7 Tex., 384, at page 452, it will see that it closely resembles the Nogales grant now under consideration in that it also was a sale of a tract of land which had been previously surveyed. These titles under the laws of Coahuila and Texas, as the Supreme Court of Texas say in the above cited case, at page 452, which language is adopted by this Court in the case of Gonzales *vs.* Ross, 120 U. S., 605, at page 626, "Conveyed all the estate and interest which the government had to convey as absolutely and to the same extent as did the delivery of the final title or the final act of confirmation by the Spanish government after the performance of the conditions. No act of confirmation by the government was required or was contemplated by the colonization laws; but when the title of possession issued, the government had done the final act on her part. Nothing remained to be done to consummate the title of the grantee, who was thereby invested with the legal seizin of the land in fee." A title in fee, as the title-paper shows, was issued in this Nogales case, as in all of the Sonora grants, one of which was before this court in U. S. *vs.* Cameron, 148 U. S. 301, *supra*.

In leaving this point we confidently urge that no such thing as a grant by quantity, that is, an imperfect, floating grant, not surveyed at the time, was known to the laws of Sonora, and that it is simply impossible to consider the present grant a grant by quantity, because the title-paper states that it was made under the laws of 1825 and 1834, which provided for the sale of surveyed lands only. The court below cites no authority in support of its theory, and none can be found. The laws will be searched in vain for any provision contemplating such a grant as the court below held this to be. With due respect, it seems to

counsel that the court below fell into a marked error in its holding, one at variance with the laws and history of the states of the Mexican Republic.

VI.

This Court has in many cases pointed out the difference between located and unlocated grants. In Stoddard *vs.* Chambers, 2 How. 284, the petitioner prayed "for a concession of 350 arpens of land," and in Bissell *vs.* Penrose, 8 How. 317, the applicants supplicated for "eight hundred arpens of land, in superficie, making altogether the quantity of four thousand arpens, which they wish to take in one or several places of the king's domain." Each of these concessions, this Court said, "was a general and unlocated one." As pointed out in Snyder *vs.* Sickles, 98 U. S. 203, all the governors of the province of Louisiana could do "was to issue to the donee an instrument called a concession or order of survey, which never invested the party with a fee-simple title;" and in the other cases cited under point VI. of this brief, a floating warrant or concession, not severed from the mass of the public domain, was treated as "unlocated," and not entitled to confirmation except as Congress saw fit to act; but these cases hold that where there had been a survey, or where by any description the lands could be identified as a specific parcel separated from the public domain, the grant was located. In Pinkerton *vs.* Ledoux, 129 U. S. 346, 354, Mr. Justice Bradley in delivering the opinion of the Court said: "Where the original grant does not locate the subject of the grant, as where a certain number of square leagues is granted to be located within a certain district, the delivery of possession within the district renders the title complete and defines the location of the grant." "The judicial possession was conclusive as to the boundaries and extent of the land granted."

Language more applicable to the case at bar could not be used, and tested by these decisions the grant must be considered as located, as that word is used in the treaty. It is no floating warrant or concession, but an executed contract of sale, and it does not seem necessary to argue further that the contracting nations to the treaty did not intend to forfeit lands which had been surveyed, appraised, sold, paid for and occupied, as the present grant was.

VII.

The proof was full that this grant was duly recorded in the archives of Mexico. What was required in recording a Mexican grant was succinctly stated by this Court in U. S. *vs.* Osio, 23 How. at page 279, as follows: "Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in California, when a short entry was made in a book, kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued." The title-paper of this Nogales grant states that the title shall be delivered to the grantees "after recording it in the proper book," and contains at the end of the grant the statement that "record of the present title is made at folio 64, back, of the proper book, which exists in the treasury of this department." The witness Ainsa testified (rec., pp. 40, 41) that there was in the office of the treasurer general at Hermosillo, Sonora, a book entitled "Libro de Toma de Razon," which is the book in which grants were recorded, and witness offered in evidence a copy of the entry of the record of this Nogales grant, which entry he testified he had copied from the bottom of page 64 of the Toma de Razon, continuing on the reverse side of the page. Witness Tichenor also furnished a verbatim and literal copy from this book

of Toma de Razon of the entry of this Nogales grant, which copy he testified "was made in the office of the treasurer general, at Hermosillo, Sonora, Mexico, in the presence of Bartolomio Rochin, the archivero of that office, and is an exact copy of the entry in the book of Toma de Razon on page 64 and the reverse side thereof, letter for letter in Spanish." (Rec., p. 47.) Both Ainsa and Tichenor, after proper preliminary proof as to their qualification, testified that they were familiar with the signature of Lopez, the officer who executed the grant, and Tichenor testified that he "made a careful examination of several signatures of Ygnacio Lopez, among others, upon various documents, and made some tracings of his signature and other signatures for the purpose of testifying to their genuineness," and continued "I have in my hand now my notes of the examination made at the time, among them the tracing of the signature of Lopez taken from the entry in the book of Toma de Razon of this Los Nogales de Elias grant." (Rec., p. 46). Neither of these witnesses was cross-examined as to this book of Toma de Razon. In addition to this testimony the records shows (see stipulation on page 141) that defendants offered in evidence the certificate, appearing on page 125 of the record, of the treasurer general of the State of Sonora of the entry in the book of Toma de Razon of the record of this Nogales grant, which entry is identical with the one a copy of which witnesses Ainsa and Tichenor produced. In the translation, appearing on page 126 of the record, of this certificate of the treasurer general, the page on which the entry appears in the book of Toma de Razon is given as 45, but the Court will see at a glance that this is either an error of the printer or a clerical error in translating, for the original certificate in Spanish shows that the entry of the record of this grant is on folio 64, vuelta, that is, on page 64 and the reverse side thereof, of the book of Toma Razon.

As to the original matrix or expediente of this grant, the stipulation which is made part of the record shows that the original archives containing such papers, dated from 1841 to 1843, inclusive, had been removed from Hermosillo, Mexico, to the City of Mexico, by order of the proper Spanish authority. This matrix was in the archives at the time this grant was issued, for the title-paper recites (p. 17) "In these terms these proceedings were concluded with all the requirements and formalities the law, regulations and superior instructions on the matter provide, said original proceedings being deposited in the archives of this office, in the treasury department, as a perpetual testimony." This Court held in Gonzales *vs.* Ross, 120 U. S. 605, at page 629, that with regard to an archive of title "where there is a testimonio there is a presumption that the original is among the archives of the land office, its proper place of deposit. At all events, it is for the defendants to show by proper proof that it was not there."

VIII.

As to the authority of the officers who acted in this matter to make the grant in question, it has been decided by this and other courts too often to call for any extended citation of cases that "where public officers have a public duty to perform, in the absence of evidence to the contrary the presumption is that they act in accordance with their instructions and the law as known at the time. All favorable presumptions will be made against the forfeiture of a grant. A presumption is always indulged in in favor of the validity of the acts of officers of a former government." (Gonzales *vs.* Ross, *supra*, 605, 616, 622, 623). In addition to this general presumption of authority, there is in the case now under consideration a fact which creates a presumption which is very strong, if not irresistible. After the survey, appraisement and publications of the

vacant public lands had been completed, the proceedings were referred to the Mexican attorney general of the treasury for his opinion. This officer, as heretofore shown, gave a careful and minute report, stating that "all the requirements of the laws, decrees and instructions that govern in the matter had been complied with," and recommended that the treasury make three public offers of sale and that the land be sold to the highest bidder, and, on the payment of the price, that the corresponding title be issued, and the final sale was made on the advice of the attorney general. In Mitchell *vs.* U. S., 9 Pet. 716, at page 742, this Court had under consideration the validity of a sale which had been made under the advice of the Spanish attorney general or assessor general, and held that the grant being made on his advice, the presumption was very strong, if not irresistible, that everything preceding it had been lawfully and rightly done. This holding is directly applicable to the present case. The attorney general who advised the final sale in this Nogales grant was the law officer whose duty it was to pass on the legality of such matters. He did carefully examine the proceedings, and pronounced them lawful and regular in every respect. Is it not reasonable that this should create an irresistible presumption that the proceedings were correct? Certainly he must be presumed to have known the laws of his own country and of his own office. If, as is claimed by counsel for the government, the Mexican officials had no authority under the laws then in existence to make this grant, would not the attorney general have known so and reported so? But he was of opinion that they did have authority. This ruling in Mitchell *vs.* U. S. seems conclusive on the point that this grant, made on the deliberate advice of the attorney general, must be presumed to be valid. In Hornsby *vs.* U. S., 10 Wall. 224, this Court repeated what it had announced in Fremont's case, 17 How. 561, that it "could not, without doing

injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution." In this Nogales case the chief officers of the department took part. The governor and president of the superior board of the treasury of the department furnished the authenticated copy required by the law (title-paper, p. 3), the departmental treasurer, who by the law of December 16, 1841, succeeded to the functions of the superior chief of the treasury, referred the proceedings to the attorney general of the treasury, that officer gave his opinion, the various members who comprised the board of sales assembled and took part, the purchase price of the land was paid into the treasury, the departmental treasurer issued the formal title and recorded it in the proper book, and no objection was made to any of these proceedings. When so many and so prominent officers supposed that they had authority to do as they did, we do not think this Court will hold that they did not know the laws that governed them, especially in view of the fact that under the laws it was the duty of the superior chief of the treasury to make report to the supreme government if he thought it necessary, and no objection to the grant was ever made.

But we are not left to presumption on this point. The laws under which this title was issued are set out in the instrument, and an examination of them will show that the grant was made in strict conformity to their provisions. If the authority of the officers is not presumed but is required to be proved, this can easily be done.

In order to understand the status of the Department of Sonora in 1841 and the relation of the departmental officials to the general or federal government, the prior political history and legislation of Mexico should be considered. This is set out with some fullness in Chambers

vs. Fisk, 22 Tex. 504. The starting-point of the separation of New Spain from Old Spain may be regarded as the proclamation of the Plan of Iguala (February 14, 1821,) and its consummation by the Treaty of Cordova (August 24, 1821). These two acts constituted the empire or kingdom of New Spain. Independence was achieved September 27, 1821. The first Congress met November 7, 1823, and framed a constitution which went into effect October 4, 1824. The Acta Constitutiva created by decree of January, 31, 1824, the states of the Federation, among which was the "State of the West," "Estado de Occidente," composed of the provinces of Sonora and Sinaloa. Sonora was made a separate state by the law of October 13, 1830. (Comp. Laws of Mexico, vol. 2, p. 291, No. 875.)

On August 4, 1824, was pased the decree entitled "Classification of Rents" set out in full in appendix to appellee's brief, article 11 of which is that "the revenues, not comprehended in the previous articles belong to the states."

The same Congress passed the decree of August 18, 1824, entitled "On Colonization," article 3 of which is "For this purpose the legislatures of all the states will, as soon as possible, form colonization laws or regulations for their respective states, conforming themselves in all things to the constitutional act, general constitution, and the regulations established in this law." This law was made effective by the rules and regulations for the colonization of the territories of the Republic of Mexico, November 21, 1828. These rules and the decree of August 18, 1824, are set out in full in the 10th California Reports, pp. 623-637.

The 15th article of the Plan of Iguala provided that all the branches of government should continue as they then were, and article 12 of the Treaty of Cordova stipulated that when the Provisional Junta was installed it

should, for the present, govern in conformity with existing laws in all that did not oppose the Plan of Iguala, until the Cortes should form the constitution. The decree of October 5, 1822 (Comp. Laws of Mex., vol. 1, p. 547), and subsequent decrees continued and confirmed all the authorities as they then were, in order to legalize the exercise of their respective offices.

After the laws of August 4 and 18, 1824, the various Mexican states passed laws for the colonization or sale of their lands. Coahuila and Texas passed its colonization law in 1825, the State of Tamaulipas enacted a similar law in 1826 (see Chambers *vs.* Fisk, *supra*), and on May 20, 1825, the Constituent Congress of the State of the West passed law No. 30 for the sale of its lands. This law begins "No. 30. The Constituent Congress of the free, independent and sovereign State of the West has seen fit to decree the following provisional law for the purchase of the lands of the state," and sets out in detail the fees for the treasury of the state; the fees for surveyors; the fees for the last public offer, and contains general provisions in explanation of the law. The organic law of the treasury was passed by the Congress of Sonora July 11, 1834, and this law and the one of 1825 are set out in full in the appendix to this brief. It will be noticed that these laws were not colonization laws, having in mind the colonization of foreigners, but were laws for the sale of land outright.

The experiment of the federal republican government, "The Mexican United States," formed under the constitution of 1824, was not successful, and it was rejected or suspended, and that of a central or unitarian republican government was substituted. This great step was taken by the "Law on Constitutional Bases," October 3, 1835 (Comp. Laws of Mexico, vol. 3, p. 75, No. 1626), which put an end to the states by dividing the national territory into departments, each with a "junta departmental" instead of a Congress, and with governors appointed by

the general government. With this cessation of the federal government and the sinking of the states into departments, the vacant lands (terrenos baldios) came under the immediate and actual jurisdiction and political domain of the Republic.

But while the power which disposed of such lands thus changed, the method of procedure in making sales remained the same. By article 10 of the law creating the departments (Comp. Laws of Mex., vol. 3, p. 77), it was provided that "in all that concerns the administration of the treasury the governors and the respective officers will proceed according to the laws, regulations and instructions of each state in so far as they are compatible with the new organization of the revenues, and until the general Congress shall formulate further measures,"

The question of the continuance in force of the laws of the old states was directly passed upon somewhat later, and it was announced in the circular of September 20, 1838 (Comp. Laws of Mex., vol. 3, p. 552, No. 1988), that all laws of the states continued in force which had not been expressly repealed.

By the law of December 30, 1836 (Comp. Laws of Mex., vol. 3, p. 218, No. 1807), the territory of Mexico was divided into as many departments as there were states, with certain modifications, and by decree of the supreme government of April 17, 1837 (Comp. Laws of Mex., vol. 3. pp. 363–376, No. 1855), the revenues which belonged to the supreme government and the departments were defined, Superior Chiefs of the Treasury and Treasurers General of the Department were created, and full regulations for the conduct of the business of the departments were promulgated. Article 1 of this law provides that "until the general congress establishes the revenues that are to form the national exchequer in all the Republic of Mexico, the revenues, taxes and property of which the supreme government is in possession shall continue, and

the revenue, taxes and property which the departments established or acquired under the federal system and which existed at the time of the publication of the decree of October 3, 1835 (shall continue also)."

The instructions as to sales are found in articles 73, 76 and others of this law. Articles 73 and 76 are as follows:

"All the purchases and sales that are offered on account of the treasury and exceed $500 shall be made necessarily by the Board of Sales, which in the capital of each department shall be composed of the Superior Chief of the Treasury, the Departmental Treasurer, the First Alcade, the Attorney General of the Treasury and the Auditor of the Treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the Superior Chief of the Treasury for such purposes as may be necessary, and to enable him to make a report to the Supreme Government."

"Article 76. The proceedings of the junta shall be recorded in the proper book, attested by all the individuals composing the board, and a certified copy shall be transmitted to the Superior Chief of the Treasury, in order that he may make report thereon to the Supreme Government whenever necessary."

The other laws referred to in the title-paper are merely laws continuing taxes in force from year to year.

It is thus seen that this grant was made by the departmental officials, who were acting under the laws of the Supreme Government, and that it was made in compliance with the laws of the Supreme Government. These officials were familiar with the laws, and refer to them not only in the caption of the grant but throughout the proceedings. On page 3 of the title-paper it is stated that "the authenticated copy required by article 76 of the decree of the 17th of April, 1837, had been received from his excellency the governor and president of the superior board of the treasury of the department." The superior

chief of the treasury directs the proceedings to be carried out in conformity with the laws which he distinctly specifies, and the attorney general of the treasury approved all the proceedings. In his opinion he mentions that the decree No. 51 of the 12th of May, 1835, of the old state is still in force, thus showing that he understood that all the laws of the old states which had not been expressly repealed were continued in force. When the time came to make the customary offers and final sale of the land, the laws under which this was to be done were mentioned (title-paper, p. 14), and it was stated (p. 17) that "these proceedings were concluded with all the requirements and formalities the laws, regulations and superior instructions on the matter provide," and the treasurer general issued the formal grant "by virtue of the authority which the laws, regulations and superior orders that govern in the matter" conferred on him.

That the law under which this land was sold authorized the officials to make the grant seems to admit of no reasonable doubt. The Court of Private Land Claims in a case, to which attention of counsel for appellee has been called, of William Faxon, Jr., et al. *vs.* The United States, involving the Calabazas and Tumacacori land grant in Arizona Territory, thus discussed the laws above set out:

"By the law of January 26, 1831, a general Department of Revenue was created, to which was given all branches of the treasury except the administration of the mail and the mint. By the 22d article of the law it was provided that it should not go into effect until those that regulate the general treasury and the commissaries should be promulgated.

On the 21st of May following a law was enacted creating commissariats and commissaries, and on July 7th of the same year a circular was issued which was entitled 'Regulations under the law of January 26, 1831.'

By the former it was provided that there should be commissaries general in certain demarcations, among which was the

State of Sonora, in which the lands in question were situated. The 5th article of the law defined the powers and duties of the commissariats, among which was to collect and distribute the funds belonging to the Federation under the order of the Treasury General.

By the circular of July 7 the general department of revenue created by the law of January 26 was divided into three sections under whose charge should be the different branches of the treasury; to the first section, the chief of which was the First Auditor, was given jurisdiction of national property.

The 10th article provided that the general department should take an exact account of the number, location, value, condition and present method of administration of all the property and estates of the nation, and should see to the thorough collection of the proceeds thereof.

By a decree of July 20, 1831, it was provided that all contracts, purchases and sales on account of the treasury should be made by boards of sale, consisting of the commissaries general and certain designated officers. The decree also contained explicit rules, prescribing the manner in which such sales should be conducted and the record thereof made.

In 1835 the state governments were abolished or suspended, and the country was divided into departments, of which Sonora was one. Under a decree promulgated April 17, 1837 (the 73d article of which has been set out above) the principal officer of the general treasury in each department was designated as the Superior Chief of the Treasury, and on him were conferred the powers and duties formerly exercised by the commissary general. The decree also created the departmental treasuries at the capital of each department, and defined the duties of the departmental treasurers. It also provided that those officers should depend immediately upon the Superior Chiefs of the Treasury.

From these various provisions it is manifest that the power to make sales or grants of national lands situated in the states and departments was vested in the treasury department of the nation."

The particular point decided in the above case was that the power to make sales was conferred alone on the boards of sales created under the decree of July 20, 1831,

and that of April 17, 1837, and that no single member of the board could exercise the power.

This Nogales grant, it will be seen, was made by the board of sales in conformity with the laws creating it and regulating its proceedings.

IX.

The Court will see from the map of this grant that the international boundary line runs through it. Under the Gadsden purchase part of the land fell within the United States and the other part remained in Mexico. As to this part in Mexico certain proceedings were had in Mexican tribunals in 1886, more than thirty years after the treaty, and the government urges that these proceedings affected the land in the United States. We shall try to show that such proceedings could have no extra-territorial effect, but before discussing these proceedings we submit that the land which fell into the United States must be considered to be held, after the treaty, so far as the rights and liabilities of its owners are concerned, just as any other lands in the United States are held in private property. The fact that the title to this land is derived from Mexico does not give its owners any greater rights, on the one hand, nor subject them to any greater liabilities, on the other, than if the land were held under a patent of the United States. After the treaty the land changed its situs. Before the treaty it was subject to the laws of Mexico; after the treaty it became subject to the laws of the new situs, the United States. and was no longer subject to the laws of Mexico. This we believe clear in reason and under the decisions. Mr. Pomeroy in his work on Riparian Rights, discussing at §42 the rights of a private riparian owner who obtains his title by a grant from the Mexican government, confirmed by the United States, arrives at the conclusion that the rights of such owner should not differ in any respect from those held by any other riparian proprie-

tor who derives his title immediately or mediately from the United States or otherwise. "The stipulations of the treaty with Mexico," he argues, "simply referred to, operated upon and protected the titles of those private proprietors who held tracts of land within the territory ceded to the United States, under grants from the Mexican government. The legislation of Congress and the judicial proceedings instituted under it were intended to carry into effect these treaty stipulations, and they operated solely upon the titles, by declaring, confirming and establishing the private ownership of the grantees as derived from the Mexican government, * * but the treaty, while thus securing to the private proprietors the title and ownership of the tracts of land which had been granted to them by Mexico, did not attempt to provide that this ownership should be governed and controlled by the rules of the Mexican law, nor by any other rules of law different from those which would govern and control all private ownership of land within the territorial jurisdiction of the United States, or within the jurisdiction of any particular states. * * It seems plain, therefore, that the riparian rights of a private proprietor holding by a Mexican grant duly confirmed are exactly the same, governed by the same rules, as those held and enjoyed by any other private riparian proprietor within the state."

This same doctrine was announced by Mr. Justice Field in delivering the opinion of this Court in Hagar *vs.* Reclamation District No. 108, 111 U. S. 701, 706, and was fully discussed in Woodruff *vs.* North Bloomfield etc. Co., 18 Fed. Rep. 801. The principle is clearly stated in Fremont's case, 17 How. 542, at pp. 563, 564.

Of course, other rights would be held in the same way as riparian rights, that is, such rights would be held and enjoyed as similar rights would be held and enjoyed by any other private owner of land.

We come now to a consideration of the proceedings

in Mexico, which were offered in behalf of the government. These proceedings take up considerable space in the record, but their substance can be briefly stated. In 1882 one José Camou, who claimed to be the owner of half of the "Los Nogales de Elias" ranch, situated between the ranches of "La Casita" and "Tumacacori and Calabazas," proceeded under the law of the State of Sonora of July 22, 1863, to denounce the overplus, praying that the grant might be surveyed for the purpose of ascertaining how much such overplus was. A surveyor was appointed to determine the overplus of the grant, in case any should result within its monuments. A re-survey was made, and the Mexican surveyor reported in 1882 (rec., p. 106) that the tract of land surveyed in 1841 contained within its boundaries 17,882 hectares, 55 ares and 90 centiares. Of this total area the part in the United States was computed to be 3,947 hectares, 23 ares and 28 centiares, and the difference between this and the total area gave the amount of land in Mexico, viz., 13, 935 hectares, 32 ares and 62 centiares. The $7\frac{1}{2}$ sitios and two short caballerias amount to 13,251 hectares, 34 ares and 43 centiares. Deducting this from the total area an excess or surplus is left of 4,631 hectares, 21 ares and 47 centiares, for which surplus Camou paid in full $555.74 (rec., p. 124).

The Court will, we trust, particularly notice the fact that these proceedings were based on the theory that Camou, the denouncer, owned the land in the United States. According to these Mexican proceedings, the original grantees had paid for all the land both in the United States and Mexico except this surplus of 4,631 hectares. For this they still owed, and when this surplus was paid for the whole contents of the tract were paid for in full, and the purchaser remained the undisputed owner, so far as Mexico was concerned, of all the land in the United States and all the land in Mexico. It was found that the original

computation of the contents of the tract was too small. More land had been conveyed than had been paid for. Under the law of Sonora of 1863 this error was adjusted by a further payment, and the whole amount of land embraced in the survey having been paid for, this whole amount remained the property of the grantees.

It will thus be seen that if the rights of the claimants were to be determined by these proceedings in Mexico, all the land in the United States, as defined by the survey of 1882, would be theirs. These proceedings involved a ratification and confirmation of the grant by the supreme government, and a sale and confirmation to the grantees of the whole of the tract of land embraced within the survey of 1882. The Mexican government acknowledged that it received pay for the land in the United States and also, by virtue of the payment of the excess, for the land within Mexico.

The law under which these proceedings were instituted was passed in view of the fact that in nearly every instance early surveys of grants were inaccurate. The monuments and landmarks called for were clearly identified, but the contents were in most cases estimated in part, and such estimates were nearly always too small. The law of 1863 provided that the excess should belong to the grantee if he cared to pay for it, but if he did not care for it he had to relinquish this excess, which might then be sold to anyone else, and it was the right of the owner of the grant in relinquishing the excess to do so in any part of the grant which he selected. He could retain as the amount for which he had paid any part of the tract which he preferred, relinquishing the surplus. As a matter of fact, the owners generally did as Camou did in 1882, and retained the whole of the tract, paying for the surplus.

The position, therefore, after the law of 1863 of the owner of a grant by metes and bounds in the Mexican

State of Sonora, was that he held the land subject either to pay for the excess, if any, or to relinquish such excess.

But we confidently submit that these Mexican proceedings can have no effect on defendant Ainsa, who was not a party to them, nor can they have any effect on the land in the United States. The land which passed under the treaty could not be affected by any law of 1863, because it is not held under the laws of Mexico but under the laws of its new situs, the United States.

It must necessarily follow, therefore, as we submit, that if it is true that, under any Mexican law, the purchaser of a tract of land, sold for a sum in gross and containing a description by which its exact boundaries can be ascertained, bought such land subject to a remedy on the part of the Mexican government for an excess, when such land passes within the United States it is no longer held subject to such remedy, for no such rule of law applies here. This principle has been so often discussed and decided as to be free from doubt. In Wadhams *vs.* Sevan, 109 Ill. 46, 57 the Supreme Court of Illinois thus announced the doctrine: "The general rule unquestionably is that where a tract of land is sold for a sum in gross, by its proper numbers, as indicated by the government survey, or by any other specific description by which its exact boundaries are or may be determined, the boundaries to be thus ascertained, in case of a discrepancy, will control the description as to the quantity or number of acres, and in such case neither the purchaser nor the vendor will have a remedy against the other for any excess or deficiency in the quantity stated, unless such excess or deficiency is so great as to to raise a presumption of fraud."

The Supreme Court of Massachusetts in Noble et al. *vs.* Googins, 99 Mass. 231, Judge Gray delivering the opinion, said: "It has been declared by a great weight of authority, and in accordance, as we think, with the

soundest reason, that in an agreement for the sale and purchase of land for an entire sum, either a description of the land by its boundaries, or the insertion of the words 'more or less,' or equivalent words, will control a statement of the quantity of land or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract,'' citing the cases.

In Commissioners *vs.* Younger, 29 Cal. 172, the Supreme Court of that state held, p. 179, that '' where land is sold by metes and bounds, concluding with a statement of the number of acres, a mistake as to the number of acres affords no ground of action by either party against the other, unless it be made to appear, beyond controversy, by clear and positive testimony, that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase.''

In Stanley *vs.* Green, 12 Cal. 148, Justice Field in delivering the opinion of the court reviewed the early cases on the subject, and a full discussion of the principle is to be found, referring to only a few out of the multitude of cases, in Butterfield *vs.* Cooper, 6 Cow. 482, Jackson *vs.* Moore, 6 Cow. 706, Roat *vs.* Puff, 3 Barb. 353.

This question of excess came before this Court in an early case, Taylor *vs.* Brown, 5 Cranch, 233, where Chief Justice Marshall in delivering the opinion quoted with approval the language of the Kentucky judges that '' it is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of the surplus included within its boundaries; namely, where the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal and unjust,

inasmuch as a survey which is too small cannot be enlarged."

We think these cases apply to the present one. The sale was of the entire tract, it was for a sum in gross, namely, for the amount of the appraisement, it contains a description of the land by its boundaries, and though the words "more or less" are not inserted, they are there in effect, because the survey shows that this amount was arrived at partly by estimation, and both the government officials making the survey and the purchaser of the land knew that the contents were arrived at by computation or estimation.

This principle has been applied in cases of Mexican grants passed on by this Court. In White *vs.* Burnley, 20 How., *supra*, this Court held that a Mexican grant was not void because the surveyor returned an excess in his survey, without evidence that the grantee participated in the matter, and in U. S. *vs.* Hancock, 133 U. S. 193, it is shown that the board of commissioners appointed to ascertain and settle private land claims in California confirmed the tract of land known as "Muscupiabe," according to the specific boundaries, irrespective of quantity, and this notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries, and this decree was affirmed by this Court.

In U. S. *vs.* Estudillo, 1 Hoff. Land Cases, 204, the court said that "in most instances the description in these grants was obviously intended to designate the tract out of which the granted quantity was to be taken, rather than to indicate the limits of the land granted. In some cases, on the other hand, the boundaries are indicated with much precision, and the mention of quantity is obviously rather a conjectural estimate of its extent than intended as a limitation of the quantity granted."

We submit that this grant was obviously one of the entire tract, and that the decision herein should be reversed and a decree entered adjudging the defendants the owners in fee of the tract of land embraced within the monuments of the grant, so far as such land lies within the United States.

Respectfully submitted,

ROCHESTER FORD,
Attorney for Appellants.

APPENDIX.

Decree of August 4, 1824, Classification of General and Special Revenues, Comp. Laws of Mexico, vol. I, p. 415, No. 710, is given in appendix to brief of appellee.

This law and the regulations of August 18, 1824, are given in full in 10th California Reports, pp. 623-637.

Law of Sonora of 1825.

From

The "Collection of Degrees issued by the Honorable Constituent Congress of the free State of the West, from September 13th, 1824, in which it was installed, to October 31st, 1825, in which it closed its sessions." Part first, Page 66.

"No. 30.

"The Constituent Congress of the free, independent and sovereign State of the West has seen fit to decree the following

"Provisional Law for the Regulation of the purchase of the Lands of the State.

Fees for the Treasury of the State.

Art. 1.—For each dry sitio that can only serve for pasturing stock, ten dollars.

2.—For those where well water can be obtained, thirty dollars.

3.—For those that have a spring or river, sixty dollars.

4.—The value designated in the preceding articles is considered the minimum (value) of sitios, which can in no case be reduced.

Fees of Surveyors.

5.—For the survey of one sitio, twenty-five dollars.

6.—For that of two for the same party, thirty-seven dollars, four shillings.

7.—For that of three id. id. fifty dollars.

8.—For that of four id. id. sixty-two, four.

9.—When the surveyor surveys several sitios, but for different parties, and they do not exceed one for each locator, he shall charge twenty-five dollars.

10—For proclamations and management, up to putting the proceedings (expediente) in condition for final sale, twenty-five dollars.

11—Stamped paper shall be on account of the parties interested.

Fees for the last public offer.

12.—For the three proclamations of the last public offer and final sale, six dollars.

13.—For the opinion of the Attorney General, three dollars.

14.—For the drum and proclamations, two dollars.

15.—The title shall be given gratis.

16.—Stamped paper is on account of the parties interested, to whom nothing shall be charged for the usual notices and returns customary in the last public offers.

General Provisions.

17.—The surveyors shall be the alcaldes of the towns to whose jurisdiction belong the sitios registered; but with the authority which the Treasurer General shall previously delegate to them for the purpose.

18.—To this end the parties interested shall present themselves directly to the Treasurer General, and he shall

make the proper delegation at the end of the application.

19.—The Treasurer, as the immediate head of all the revenues, shall make the final sales (and) give the titles.

20.—The Collector of Revenues at the capital shall always be the Attorney.

21.—To no one who is a new breeder shall more than four sitios be given.

22.—To those who, from the abundance of their stock, need more, although old breeders, the Treasurer General shall grant only so much more as they need.

23.—The Treasurer shall endeavor, by all the means in his power, to satisfy himself of the truth, before making the concession which the preceding article prescribes, without the party interested having any part in the steps he may take to secure that end.

24.—No one shall obtain any sitio for livestock without first proving, in the opinion and to the satisfaction of the Treasurer General, that he has sufficient to be called a breeder.

25.—The Treasurer, to verify the truth, for the purpose to which the preceding article refers, may order an investigation made, or such secret information taken as may occur to him.

26.—For the valuation which should be made of the sitios on the basis of the value which this law prescribes for them, the surveyor-alcaldes shall appoint persons entirely impartial to the interested parties and they shall, after being informed of their obligation, proceed to discharge their commission, with attention to the more or less fertility of the lands, their location and other circumstances, in order to give them the value they justly deserve.

27.—Those who possess sitios and who, although they have them registered and surveyed, have not obtained the title, shall present themselves to the Treasurer General and shall state in writing the cause of that failure,

the deputy or judge who surveyed them for them and the outlays they have made.

28.—The Treasurer shall fix, for this purpose, the time that seems to him proper and. as soon as he gets all the information together, shall render a report to the government, which shall order the proper steps taken, with regard to the rights of the parties interested and the interests of the Treasury.

29.—The Treasurer shall give the necessary methods and instructions to the surveyors that the surveys may be legal and correct.

30.—It shall be the obligation of owners of sitios to place at their boundary termini the monuments of stone and mortar ordered in repeated laws, as soon as possession thereof is given them; and if within three months from the day the survey is concluded they do not do so, they shall incur a fine of twenty-five dollars which the surveyor-judge shall exact of them, for the public funds, and besides shall order the monuments constructed at the expense of the parties interested.

31.—Those who have an order for the registry of sitios, under the former practice, are guaranteed by this law.

32.—The tax for army expenses, the half annate tax and the percentage which the former government collected as a general rule, are abolished.

You will understand it, etc. Fuerte, 20th of May, 1825. Luis Martinez de Vea, deputy president. Jesus Almada, deputy sec'y. Manuel Escalante y Arvizu, deputy sec'y.

Translated from the original by the undersigned, January 13th 1893.

Henry O. Flipper,

Civil Engineer.

Law of Sonora of 1834.

The Governor of the State of Sonora to all its inhabitants:

Know that the congress of the aforesaid state has decreed the following:

Number 26. The Congress of the State of Sonora decres the following:

Organic law and provisional regulation for the revenues of the State of Sonora.

CHAPTER IX.

Section first. On the revenues of the State and the administrative method thereof.

Art. 53. The taxes and revenues established in the State are:

1. That of liquors.
2. That on the transfer and sale of lands.
3. The recording of titles in the transfer of estates.
4. That of excises.
5. The tax on sealed papers.
6. That on tobaccos.
7. The duty on the consumption of foreign articles.
8. That of village licenses.
9. That of branding irons.
10. The duty on assays and a fifth of the gold and silver.
11. That of coinage and reduction upon the gold and silver which is exported.
12. Tonnage duty on foreign vessels.
13. The duty of one fifth on pearls.
14. The revenue from succession in every kind of extestate property without legitimate heirs.

Section second. (Confined to administrative method of the revenues of the state. Liquors.)

Section third. On the sale of land.

ART. 57. The individual who may need a piece of land for cattle and horses, or any other use, shall appear before the treasurer-general and register his request in the name of the State. He must be accompanied by three impartial witnesses of approved fitness, in order that he may prove himself to be possessed of sufficient property to be termed a cattle-breeder. This must be done to the satisfaction of the treasurer, who can require the presence of further witnesses, or use such other means, and at such time as in his estimation convenient to get at the truth and carry out the purpose of this article.

ART. 58. To no one who is not a criador (breeder) can be given more than four sitios (ranches), but to those who on account of their abundance of property need more land the treasurer shall concede as much only as they may need, preceding this action by the acquisition of information according to the foregoing article, assuring himself, by such measures as may be necessary to his judgment, of the truth in the matter before making the special concession, to the end that those interested may have no part in the proceedings which he undertakes to fulfill the object of this law.

ART. 59. The treasurer, in continuation, shall, in considering the interests of registrants of land, be entitled to recommend to the judges surveyors for the measurement of the land, on account of special integrity or skill.

ART. 60. The treasurer, as immediate chief of all revenue, shall make the sales and issue the titles.

ART. 61. Those who occupy land, who have registered and had a survey made, but who have not yet procured a title, shall present themselves before the treasurer-general within the time specified by bill number ten of the 30th of May of the current year. The titles of the ranches of the proprietors who do not conform with this regulation shall be invalid and liable to confiscation, if

they do not anticipate the loss of their title in the term of court when the matter comes up, giving reasons in writing for the cause of their dereliction to the subdelegate or judge before whom they appear and make proper disbursements.

ART. 62. The treasurer shall give due notice at the time which appears to him opportune, and as soon as he has done this he shall make over the proceedings to his fiscal promoter (attorney-general) in order that the latter may determine upon the most convenient method for the taxation of those interested, and for the public treasury.

ART. 63. It is the duty of the owners of sitios (ranches) to place upon the boundary lines of their estates landmarks of stone, as ordered by the statutes, as soon as they are in possession of their estates; and if within three months, counting from the date that they received their title, they have not complied with this regulation, they shall incur a penalty of $25, which they shall pay to the judge for the public funds, who moreover shall cause the said landmarks to be constructed at the cost of the said proprietors.

Section Four. On the taxes upon property.

ART. 64. The valuation of each dry ranch, which can serve only for pasturage, shall be $15; for those on which water can be obtained from wells, and which have meadow land, wood, etc., $40; and without these adjuncts, $35; for those which have springs or river, whether dry or otherwise, $60, and $80, those farms which contain grain-bearing land and are very fertile.

ART. 65. These valuations are the minimum on estate, and can on no account be rebated.

Section Five. Fee of surveyors.

ART. 66. The surveyors shall have a tax of $25 for the measurement of a ranch. For the measurement of two for the same individual, $37.50. For that of three ranches for the same owner, $50; for that of four, ditto, $62.50.

ART. 67. When the surveyor measures several

ranches, each for a different person, each registrant shall be taxed $25.

ART. 68. The surveying, auditing and assessing officials shall be paid by the registrant at the rate of fifty cents daily.

ART. 69. For notices and legal proceedings from beginning to end, $25 shall be paid. The sealed papers shall be at the cost of those interested.

Section Six. Tax on the final public sale.

ART. 70. For the three public notices of the public sale there shall be paid six dollars for the public treasury; for the attendance of the fiscal promoter, $3; for the printer and publisher, $2. The valuation of the title shall be $30. The sealed paper is at the cost of those interested, but there shall be no extra charge for the ceremonial business customary in final sales.

Section Seven. General regulations upon the transfer of estates.

ART. 72. For the assessment of valuation above that minimum which the law provides, the surveyor shall name persons totally impartial in relation to those interested, and after the customary oath has been imposed, they shall proceed to fulfill their mission, estimating the greater or lesser fertility of the land, its locality, and other circumstances, to give it the value which it justly merits.

ART. 73. For the reason that land surveyors ought to have a practical knowledge of the lands which they measure, it is on their responsibility that the valuations are regulated precisely according to the conditions which appear in the foregoing article, and the conditions which are expressed in the 64th article of this law.

ART. 74. Every commissioner of surveying has as a duty to cite persons before him to meet the proprietors of adjoining lands, in order that their respective titles and boundaries may be approved. To this effect he will notify them or their agents to appear before him at a certain day,

and if they do not appear on the day specified, without justification or legitimate cause, the land surveyor shall proceed to carry out his duty, taking care not to lean to either side in the controversy. The costs shall entail to those whose claims do not coincide with the decision of the surveyor.

ART. 75. The notices of the land to be measured shall be made public by the land surveyor in the town to whose jurisdiction the matter pertains.

ART. 76. If, on any account, the publication can not be published in the manner designated by the foregoing article, they can then be published in some other town, provided that it be not further than necessary from the respective locality.

ART. 77. If the person desiring to make proof can not do so on account of some personal infirmity or inconvenience which cannot be removed, the commissioner referred to shall be paid fifty cents per league for coming and going to the said place.

ART. 78. It is the duty of the treasurer to give to the land surveyors all the instructions that he can, formularities for measurement, and everything that will tend to better instruct them in their work; also to expedite the dispatch of confiscated registrations and titles of exchange without permitting delay or license to do injury to the parties concerned. Arispe July 11, 1834.

Law of October 3, 1835, abolishing state legislatures and establishing departmental councils, is given in part on page 5 of appellee's brief. Article 10 of this law, continuing in force the laws of the states as far as applicable, is given on page 53 of this brief.

The other laws referred to in the title-paper are given in part in the appendix to appellee's brief.

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OCT 28 1895
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 429.

SANTIAGO AINSA ET AL., APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Supplemental Brief for Appellants.

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Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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Supplemental Brief for Appellants.

The supplemental brief for the United States contains a further and elaborate discussion of the question, among others, of the authority of the officers to make this grant. The grant shows that the officers were not acting blindly or recklessly. At every step of the proceedings they take care to mention with particularity the laws under which they were acting. We think that no doubt worthy of consideration can be entertained that they did, in fact, comply with the formal provisions of such laws. It cannot be urged that the land was not properly appraised or that payment therefor was not properly made or that the grant was not issued in legal form, but the main contention of the United States is that the laws under which the officers acted had been

repealed. This we understand to be the substance of the argument on the point of authority.

There is one law cited at page 53 of our main brief, though its contents are not there given in full, which is not discussed or even so much as mentioned in the argument for the government. This law the undersigned believes, and believing so submits to the Court, summarily disposes of the contention of the government on the point of authority. We rely much upon the construction given to the laws by the high officials in making this grant. This Court has said in Hornsby *v.* U. S., 10 Wall. 224, heretofore cited, repeating what it had announced in the Fremont case, 17 How. 561, that it "could not without doing injustice to individuals give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution." As proof that the land was subject to sale in the manner in which and by the officials by whom it was sold, we rely on the fact that the Superior Chief of the Treasury of the Department of Sonora, who was, by statute of the Supreme Government, the head of all the employés of the Treasury, ordered it sold. We cannot entertain the idea either that he did not know the status of the existing laws of his own country or that he was acting in defiance of them. Again, we rely even more on the fact that the Departmental attorney general, a law officer who was acting in subordination to the Supreme Government of Mexico, and whose power and duty it was to pass on the validity of the very laws now being discussed more than half a century later, examined the proceedings and pronounced them correct. We cannot entertain the idea that counsel for the United States, however learned they may be, can at this day know more about the Mexican law than this attorney general knew of his own laws at the time. We have full confidence in the foregoing, but this is not the strongest position we take in this case on this point. This is not what we refer to as, in our opinion,

summarily disposing of the contention of the government herein.

What we do refer to is the fact that the Supreme Government of Mexico itself formally declared that the laws under which this grant was made had not been repealed. We have shown, page 53 of our main brief, that by the law of October 3, 1835, creating the Departments, it was provided that "in everything relating to the Department of the Treasury," and, of course, sales of land came under this head, "the governors and the respective officers shall proceed in accordance with the laws, regulations and orders of each State, in as far as may be compatible with the new organization of the revenues and until the general Congress adopts suitable measures for the future." By the same law all the subordinate employés as well as the officers, revenues and branches of the service they manage were subject to and at the disposal of the Supreme Government of the Nation, through the proper Governor. (Article 5 of said law.)

We have submitted, and again submit, that if it was compatible with the new organization for the Supreme Government to sell for an adequate money consideration lands to its own citizens in a part of its domain where every reason existed to promote settlement and occupancy of the vacant land, then the laws for the sales of lands originally passed by the State of Sonora and acted under steadily by that State without objection for ten years, became by this adoption the laws of the Supreme Government applicable to the Department, our belief being that the Supreme Government recognized that it was as necessary for its citizens to own land, raise cattle and pursue the ordinary vocations of life under a Departmental form of government as under a State form, and that as the State laws for the sale of land had been in successful operation for so long, it was the part of wisdom to reënact or continue them rather than go to the unnecessary trouble of making new laws.

But counsel for the government maintain, if we under-

stand the main point of their contention, that the laws of April 4 and April 17, 1837, effected a repeal of all laws for the sale of lands, counsel stating (page 42 of their supplemental brief) that "it is a rule of construction in all countries governed by the civil law that repeals by implication are favored, and that a subsequent law upon the same subject repeals a former law by implication, unless by the terms of the latter law the former is kept in force."

As opposed to this assertion we quote hereunder what we have said we rely on so strongly. It is the following circular issued by the Minister of the Interior of Mexico on May 25, 1838, and is found on pp. 1021–1022 1st. Vol. Galvan's Coleccion de leyes y decretos, and also on p. 557, 3rd Vol. Comp. Laws of Mexico:

No. 1988. *Sept. 20, 1838—Circular—Stating that none of the subordinate authority shall ask information of the departmental governments, and in reference to the remaining in force of the laws of the States.*

DEAR SIR: The president of the government council, in a note of the 25th of August last, has transmitted to this Ministry the following communication: (or advice)

"DEAR SIR: The council decides, and has sent as their conclusion to the President the following:

"Don José Maria Lopez complained to the inspector of permanent militia that his son and two servants had been detailed (drafted) to the army service by the authorities of Pueblo, and, on that account, the inspector sought information in reference thereto from the Government of that Department; but the governor did not consider it his duty to answer, on account of a law which he thought was in force in his department, passed when it was a State, in which the authorities are admonished what to do in such cases, the rules under which it is to be done, with the requisites, and finally, designates the authority which in a last resource must judge the excuses of the enlisted (drafted). From this resulted a good deal of correspondence between that Government and the inspection (bureau), terminating, at last, in

an appeal to the supreme government to decide the question.

"The supreme government transmitted to the council the *expediente* for consultation upon all the points concerning the matter; and, in addition, as to whether the laws of the old States ought to be enforced to the detriment of the rights of the same government.

"With regard to the question arising between the inspection and the government of Pueblo, the undersigned believe that the said honorable governor refused, justly, to give the information desired, he understanding that no subordinate authority can directly have communication with the governments of the departments to require from them information or any data that may seem important to them in the discharge of their duties, unless it is preferred as a request, but in any other way or manner only the Supreme Government can require the same, as well as those officers who are immediately subject to it; therefore, what should be the practice in these cases is to apply to some of the divisions of the office of the President, so that, if he judges it necessary or convenient, he may require the information or important documents for the use of the inspection (bureau) or office that needs them; and this, in the judgment of the council, should have been the course pursued by the inspector.

"To decide the second point of the contention of the government, the commission makes some observations that may be useful for the purpose.

"It must be principally noted, that there are in force all such laws as are not openly inconsistent with the prevailing system and unless they are found to have been expressly repealed by any other subsequent disposition, this rule also holding good in regard to those laws which were decreed (passed) in the very remote epochs, and under the different forms of government which the nation has had; and that, therefore, the courts and other authorities daily transact their various duties under the existence of the laws of the Cortes of Spain, of the laws of Partidas and Compilation, as long as this disposition is not repugnant, more or less, to the form of government in which they were sanctioned.

"This principle being established, there follow two natural consequences; the first is, that there ought to be considered as in force the laws of the old States, whenever these

contain the requisites mentioned above, unless they are repugnant to the form of government under which they had their origin, or unless the supreme government has enacted any other, since their requirements cannot be superior (paramount) to the laws.

"The other consequence is, that if the orders of the government were the result of some of its constitutional attributes, or of some other subsequent law that authorized such or another act, then the laws of the States ought not to be considered as in force, not because they are repugnant to the requirements of the government, but because the law authorizes it to decree this or the other decree contrary to it, by the same right that any other decree is abolished by former legislation.

"From the foregoing, it is the opinion of the commission, that the advice of the government can be obtained, unless the council, with better judgment, resolves differently.

"Be pleased, your Excellency, to advise his Excellency and receive the documents which were transmitted."

And this being approved by the President, he has seen fit to order it to be communicated to the governors of the departments, so that they may take notice of this decision for the general good.

This circular is indexed (p. 806, 3rd Vol. Comp. Laws of Mexico) as "Leyes de las Estados. Están vigentes las que no están expresamente derogadas," the translation of which is "Laws of the States. There are in force those which are not in direct terms annulled."

The foregoing circular is subsequent to the laws of April 4 and April 17, 1837, and was communicated by the Supreme Government of Mexico to the Governors of the Departments prior to the execution of the grant now under consideration. We submit it as authority for our contention that the laws of Sonora of 1825 and 1834, which had been continued in force by the law of October 3, 1835, were still in force at the date of this circular, because they were not opposed to the prevailing system and had not been expressly repealed by any subsequent disposition. They were

not repugnant to the form of government in which they were sanctioned, viz., the government under the form of the State, nor were they opposed to the form of government under which they were continued in force, viz., the government under the form of a Department.

Our position on this question of authority is, stated as succinctly as may be, as follows:

I. Article 11 of the Law of "Classification of Revenues," of August 4, 1824, (p. 1, appendix to main brief for the United States) was construed by the States as giving them the right to sell the vacant lands. In accordance with this construction the State of Sonora passed the laws of 1825 and 1834 (pp. 65–73, appendix to appellants' main brief) and for ten years sales of lands were made under such laws by the State officials of Sonora. Immediately after the passage of the law of 1825 that State began to make sales under that law and continued its practice up to a time immediately preceding the creation of the Departments, October 3, 1835. Whether this construction was authorized so as to give validity to titles made by the State prior to the time of the Departments, does not have to be decided in this case. It will be directly presented to the Court in a number of cases now pending. As a fact beyond dispute however, such was the construction actually put on that law. This grant and the grants made by the State of Sonora set out in full in the Camou and Perrin cases now on appeal before this Court, and more particularly referred to hereafter, contain the statement that "whereas article 11 of the Sovereign General Decree No. 70, of the 4th of August, 1824, ceded to the States the revenues which the general government did not reserve to itself, one of which is that from the lands in their respective districts, which therefore belonged to them, and for the disposal of which the Honorable Constituent Congress of the State of Sonora and Sinaloa enacted" the laws of 1825 and 1834.

Counsel for the government say (pages 3–4 of supplemental brief) that it does not "anywhere appear by virtue of

what authority the State of Sonora assumed to provide for the sale of the public domain of the Mexican nation, unless we assume that it was claimed under article 3 of the Colonization law of August 18, 1824."

As to this statement the answer is, in the first place, that the State of Sonora did not assume to provide for the sale of the public domain of the Mexican Nation. It assumed to provide (see law of 1825) for the sale "of the lands of the State." In the second place, it never claimed this authority under article 3 of the colonization law of August 18, 1824, or under any provision of any colonization law. On the contrary, as just stated, the grants made by the State of Sonora as shown by the ones now before the Court in the Camou and Perrin cases and by the preamble in this very Nogales case itself, refer in each instance to article 11 of the law of August 4, 1824 (by some clerical error cited as August 10, 1824, in the Nogales grant).

Counsel for the government base their opposition, in its last analysis, on the proposition that the repeal of laws specifically designated as "colonization laws" affected, also (page 32 of their supplemental brief), "the absolute repeal of the law on the classification of revenues," August 4, 1824, though it is not suggested, and it is not a fact, that such law was ever in terms repealed. Up to the execution of this grant that law was never spoken of in any repealing statute, so far as appears by the laws which the assiduity of counsel for the United States has collected. Counsel assert (p. 37 of supplemental brief) that "whether the lands were conceded to a contractor like an empresario or whether they were sold to native citizens, it was all referred to as colonization." The answer to this assertion is that the well established facts are, we submit, otherwise, and that the clearest distinction was from the very start maintained in the laws of Sonora as well as the laws of the general government between laws of sales of lands to its citizens and colonization laws.

The constitution of the State of the West (Sonora), pre-

pared in 1824 and adopted in 1825, authorized its congress or legislature, "to impose taxes," "to promote and encourage agriculture," and "to make rules for colonization in conformity with the laws." Here, it is submitted, is full proof that the power to colonize was considered as separate and distinct from the power to sell lands to citizens of Sonora. As a matter of fact, as herein repeatedly stated, the laws for sales of lands to citizens were passed in 1825 and 1834, and for ten years sales of lands under such laws were made to citizens without a word of protest from the general government. Sonora did not pass a colonization law till May 6, 1850. Such law referred distinctly to the colonization of foreigners, and is as different in its intent and provisions from the laws of 1825 and 1834 as one thing could well be from another. This first colonization law of Sonora was promptly annulled by the Mexican Nation on May 14, 1851 (page 17, supplemental brief of United States). The fact that this colonization law was annulled while no reference of disapproval of the laws of 1825 or 1834 was ever made, shows that these latter laws were considered valid, and that they remained in force.

2. Section 8 of Article 161 of the Federal Constitution of 1824 made it the duty of each Mexican State—

"To present annually to each one of the houses of the General Congress a minute and comprehensive report of the amounts that are received and paid out at the treasuries within their limits, together with a statement of the origin of the one and the other and touching the different branches of agriculture, commercial and manufacturing industries," etc.

Under section 9 of Article 161, of the same constitution each of the States was obligated—

"To forward to the two Chambers (of the Federal Government) and when they are in recess, to the Council of the

Government, a certified copy of their constitutions, laws, and decrees."

In Clinton *vs.* Engelbrecht, 13 Wall. 434, referring to a law of Utah, this Court said:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Under the reason of this decision we submit that the fact that the laws of Sonora of 1825 and 1834 were not disapproved by the general government must be considered as an approval of them. The general government promptly disannulled laws of the State which were considered objectionable, and did this from the earliest days. For instance, the decree of the Federal Government of March 9, 1829, declares that the decree of the State of the West, No. 97, of December 20, 1828, relative to one D. Francisco Iriarte, is contrary to Article 157 of the Federal Constitution. (Vol. 1 Leyes y decretos mexicanos, p. 7.)

This is cited as one of many instances showing beyond question both that the Mexican general government knew what was being done in the States, and that it disapproved what it did not like. Therefore, its disapproval of certain laws is an approval of other laws as to which it was silent, and it follows that the laws of the State of Sonora providing for the sales of lands were actually in force at the time of the creation of the Departments, October 3, 1835, and that they were continued in force by Article 10 of that law, and were in force when this grant was made.

The undersigned has not, as he hopes, stated his position

as confusedly as counsel for the government on page 29 of their supplemental brief would have it appear. There is no confusion as to the laws under which this grant was made. It was not made by the State of Sonora nor by virtue of the enactments of the legislature of said State, as such, but was made under such laws by virtue of the fact that they had been continued in force by enactment of the supreme government and were therefore in every respect laws of the supreme government as fully as though originally enacted by that government, and, on the other hand, they had no more efficacy as laws of the State of Sonora than if they had never been enacted by that State. The officials of the State government yielded prompt acquiescence to the change to the Departmental form of government. There is not one word in all the laws that have been cited to suggest that after October 3, 1835, and before the execution of this grant, the State of Sonora as a State, or any officials acting under Sonora as a State, attempted to make any sales of lands.

Our position on this point of authority has the merit of being the construction which the Mexican officials themselves gave to this grant, as recited in its preamble. They state that the lands had belonged to the State of Sonora; that that State had passed laws for their sale, and that the revenues from such sales then belonged to the departments as they had formerly belonged to the States, and that they so belonged by virtue of Article 1 of the decree of April 17, 1837, and the other laws cited.

Counsel for the United States urge that these revenues did not belong to the Department. The Mexican officials believed that they did. The Court will decide whether the Mexican officers knew as much about the laws of their own country at the time as American lawyers now know.

On the point of the meaning of the law of August 18, 1824, the Court held in Arguello *v.* U. S., 18 How., 539, that if there were a doubt as to its meaning the fact that the governors habitually made sales of lands to Mexican citi-

zens would be strong evidence that the law justified them in so doing. The meaning of the law is shown by the meaning which the officers got out of it as evidenced by their acts. Attention is called to this Arguello case as applicable to the present case.

3. Assuming that these laws for the sales of lands were actually in force when the Departments were created on October 3, 1835, and that they were continued in force by Article 10, above quoted, of that law, we take as the third step in this argument the position, heretofore indicated, that the circular of May 25, 1838, shows that under the construction which the supreme government put on its own laws, the laws under which this grant was made were not repealed by the law of April 17, 1837, or any other law prior to the making of this grant.

In the first place, such laws have not been technically repealed in terms. Counsel for the government say (p. 26 of their supplemental brief) that "after April 4, 1837, no public assertion of the power in the State to dispose of the public lands was made without a direct and immediate declaration on the part of the supreme government that such an assertion was unconstitutional, and contrary to the general law of April 25, 1835." So far as this applies to colonization laws it is true, and shows what we are contending for, that Mexico did not content herself with repealing laws of the State by any implication. They were repealed by number and date and direct reference. But the laws of Sonora as to sales of lands had never been so repealed. They had been allowed to stand without one word of objection. This fact is believed to be important enough to warrant the repetition of its statement.

Again: sales of lands to Mexican citizens for the purposes of grazing and agriculture were not within the mischief which was feared and which the supreme government

attempted, in retaining its supervisory power as to colonization laws, to prevent. The supreme government feared, and, as the history of Texas shows, with the strongest reasons for such apprehension, the influx of Americans from the North; but there was nothing to fear from selling lands to her own citizens.

Finally as to this point: the sale of lands to Mexican citizens was not inconsistent with the colonization laws of the general government or with the policy of that government under any of the forms which it or the States or Departments assumed in their turbulent history. This Court in Arguello *v.* U. S., 18 How. 539, heretofore cited, declined to impute to Mexico the "weakness and folly" of not selling lands to her own citizens, and there certainly never was a time when sales of lands were wiser than at the date of this grant. The country was at the time devastated by the Apaches. It was to the highest interests of the government that those marauders should be kept in check. Within the last few years the government of the United States has spent perhaps literally more than a million dollars in quelling and removing the Apache Indian Geronimo and his band from Arizona Territory. For the Mexican government in 1843 or at any time near then to cope with the Apaches, it was necessary that the country should be settled, and to settle the country required the sales of lands. For the supreme government in 1843 to fail to use all efforts to sell lands such as this Nogales grant would have been worse than "weakness or folly." It would be more like self-destruction. Mexican citizens were willing to buy these lands and pay their full value. Why should not the government in the exercise of self-preservation sell such lands?

As to the minor objections suggested in the briefs filed for the United States, the language which this Court used in U. S. *v.* Johnson, 1 Wall. 326, cited and approved in U. S. *v.* Auguisola, 1 Wall., 352, seems applicable. The Court declared that in these Mexican grant cases

"it is not a part of the duty of counsel representing the government to urge microscopic objections against an honest claimant." The United States "have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality." In U. S. *v.* Moreno, 1 Wall., 400, the Court further said that the act passed to assure to the inhabitants of the territory ceded under the treaty of 1848 "should be administered in a large and liberal spirit." We have referred to the briefs and arguments opposing this grant as being those for the United States, but the main opposition to the confirmation of this grant is made by private counsel representing squatters on the claimed lands. This Court specifically held in Cameron *v.* U. S., 148 U. S. 301, that lands in Arizona claimed under grants like this were reserved from settlement and entry, and the Court held in Van Reynegan *v.* Bolton, 95 U. S., 33, that persons going on such reserved lands were "mere trespassers and intruders without color of title." The gentleman representing the squatters is of the highest legal ability and standing in his profession. The trespassers and intruders could have secured no better counsel. But the fact that such intruders are desirous, in order to defeat this grant, to raise any and every possible objection, however formal, technical, illiberal or microscopic, will not cause the Court to view this case in any other than the "large and liberal spirit" which it has always shown. "The highest honor of sovereignty is untarnished faith." Ableman *vs.* Booth, 21 How., 525. The United States have pledged their faith to confirm valid grants.

But as counsel in their supplemental brief have seen fit to raise further objections, we shall briefly answer them. We think they can all be met, for this grant is open to no objection, in our opinion. It is as complete and perfect a title as has been or could be presented to this Court—not only substantially but technically and minutely correct.

It is said on page 52 of supplemental brief for the United States that the office of "treasurer-general of the Department of Sonora" was unknown to Mexican law at the time of the issuance of this grant. This does not mean that the officer who executed the grant was not treasurer of the Department of Sonora, as he styles himself. It does not mean that there was no such office as Departmental Treasurer, but simply means that the title of the official was "Treasurer" and not "Treasurer-General." As to this objection the writer of this brief will say that to him this case seems too important for mere verbal quibbles.

On page 31 of the same supplemental brief for the United States counsel state that no such body as a Board of Sales is known to or provided for in the laws of the State of Sonora. But this statement is contradicted by the printed record in cases now pending before this Court. The grants in the case of Camou, appellant, *v.* The United States, No. 475, October term, 1895, and in Perrin, appellant, *v.* The United States, No. 480, of the same term, were each made on December 25, 1832, by the officials of the State of Sonora, acting under State laws, and it appears from these cases that (page 108 of Camou case) "In said city on the 18th day of the month of April, 1828, having convened as a auction committee the President and the Directors who compose it, they proceeded to the last auction," etc., and the land was sold for $240. In the Perrin case (p. 77 of the record) the language is "3rd Almoneda. In the said city of Conception, on the 24th day of said month and year, at a meeting of the President and members of the said Junta de Almonedas, the 3rd Almoneda and sale of the same lands was ordered," and the lands were sold for $380. "Junta de Almonedas" means "Board of Sales."

The statement is made, p. 31 of same brief, that no literal copy of this Nogales grant was ever made, as it was the duty of a certain first officer to do. But there is no evidence in the record to warrant this assertion. The grant was recorded

in the book of Toma de Razon, and there was no testimony whether the first officer copied the grant or not, because such inquiry is without any relevancy. Whether he made such copy or not is wholly immaterial. The omission of an officer to make a copy could not affect the rights of the purchasers of the land. The officer was not under their control and they were not obligated to see that he performed his duty. Whatever it was his duty to do he will, in the absence of evidence to the contrary, be presumed to have done.

The Government tries to show (p. 42 of supplemental brief) that the sale in question should not have been made by the Board of Sales, because the amount does not exceed $500. But it is submitted that counsel do not correctly interpret the meaning of the law of April 17, 1837. Article 73 of that law provides that "all the purchases and sales that are offered on account of the Treasury and exceed $500 shall be made necessarily by the Board of Sales." This means, we submit, that when the amount was known to exceed $500 the Board of Sales had to act, but it does not mean that the board was prevented from acting where the amount was less. In the Camou and Perrin cases, just cited, it is seen that the Board of Sales acted in each case, though in each the amount was less than $500. There was no way of telling in advance how much this Nogales grant would bring at the final auction. This Court saw in the Cameron case, 148 U. S., 301, *supra*, that land appraised at $210 was at the final auction bid up to $1,200. It was the exercise of proper business judgment by the Board of Sales to act in all sales of lands, because the amount depended on the result of the auction and it might in any case exceed $500. These officials knew their own laws and how best to conduct their own business.

The case of United States *v.* Cambuston, 20 How. 59, cited on page 49 of supplement brief for the United States, affords no warrant for the construction put upon it. That

case called attention to the fact that there was no record that "the preliminary conditions had been complied with which enabled the governor in the particular case to make the grant, especially in those preliminary proceedings which are required to be made matters of record." But this Nogales testimonio, admitted by the government to be genuine, contains full details of all the preliminary steps necessary to secure and authorize the sale of the land. It is stated that the application for the denouncement of the land had been passed on by the Board of the Treasury, and an authenticated copy of the proceedings instituted by the applicant was forwarded by the Superior Chief of the Treasury of the Department of Sonora to the judge commissioned to survey the land. Is it possible to suppose that the rights of the purchasers of these lands are affected by the fact that their petition is not copied word for word, although the full substance of it is stated? The case of Hornsby *v.* U. S., 10 Wall. 224, *supra*, is submitted as an answer to any such objection as the last preceding.

In their supplemental brief (pp. 49–53) counsel try to avoid the force of the delivery of juridical possession, and even to controvert the fact that juridical possession was delivered of these lands. But the case on which we most rely as to this point, Cameron *v.* U. S., 148 U. S. 301, *supra*, is so like the present one in every legal respect as to delivery of juridical possession, that the ingenuity of counsel can suggest no reason why it is not a controlling precedent on this point, and, therefore, while attempting to discriminate other cases, they do not so much as mention this Cameron case. We rely with the utmost confidence on the holding of this Court that "juridical possession was delivered in pursuance" of the designation of the landmarks set out in that case, and that such holding establishes the fact that juridical possession was delivered in this exactly similar Nogales case.

As to the delivery of this juridical possession, the state-

ment is made (p. 53 of supplemental brief) that "there is no judicial officer." But the surveyor was a judicial officer. The record states (p. 2, supplemental record) that he was a "judge commissioned to survey the tract of public land." The statement is made that "there is no assent by the coterminous proprietors." But the agent of the coterminous proprietor accompanied the surveying party and signified his assent to the survey by signing the proceedings both of survey and appraisement.

In its main brief the government urges (p. 55) that this grant was a floating grant like the grants by quantity in California passed on by this Court, but when the doctrine of juridical possession is invoked by us, a complete change of theory is made, as it seems, and the California cases are discussed to show how this grant differs from them. This is what we ourselves contend. The grant is not a floating grant or grant by quantity, and has no features in common with such grants. The proceedings on delivery of juridical possession are, therefore, not identically the same, because a grant by quantity was not surveyed at the time, while this grant was made in pursuance of the metes and bounds of a prior survey; but the effect of the delivery of juridical possession is absolutely the same. It identifies the boundaries of the tract granted.

A difference is suggested (p. 49 of supplemental brief) between a sale in gross and a sale per foot or acre. But this grant was a sale in gross. There was no application for a sale of a certain amount, and no sale of any certain amount with a reservation of any surplus. Sales of public lands are made in the United States according to a prior survey, and are made at a fixed price per acre; but the sale of a section of land is not in all cases, or even in many cases, the sale of the exact amount of 640 acres. It is the sale at so much per acre of a certain amount of the earth's surface, according to a survey supposed to contain 640 acres. If, as constantly happens, more or less

than the proper number of acres is found in any legal subdivision of surveyed public lands, the gain or loss is the purchaser's.

The sale of this tract of vacant public lands according to the metes and bounds of the survey and the computation and estimate of its contents, rests, now that the land is in the United States, on the principle of law above stated. The loss or gain in quantity is the purchaser's.

As to the statement (p. 54 of supplemental brief) "that the northwest corner monument cannot be found at all," we refer to the record. Mr. Oury found and clearly identified it (pp. 51–52 of larger record). Witness Flipper testified "I did not go to that monument" (p. 62, larger record, 19 line from bottom), and again testified "I didn't go to that northwest monument" (p. 66, same record, 18 line from bottom).

Counsel say (p. 45 of supplemental brief,) that "there is no claim that this grant had been approved by the supreme government of Mexico prior to the date of the treaty." But, on the contrary, in the reply brief of appellants, the distinct claim is made (p. 13) and is now again urged, that as no objection was ever made to this grant by the supreme government, its approval must be presumed. The case of Gonzales v. Ross, 120 U. S., 605, 619, is cited in support of this view.

Counsel suggest (p. 28 of same brief) that the supreme national order of December 24, 1840, is "probably a mistake." We deny that there is any room for supposing it to be a mistake, and submit that it shows that the proceedings in this grant were instituted by virtue of this order direct from the supreme government. We rely on this order. Its contents are not stated, but the fact that it was made and referred to as authority for this grant is, we submit, ample justification for the action which the officials took. Here at the very inception of the proceedings is the proof that the grant was made not only with the knowledge but

under the order of the supreme government. This order of itself refutes, we believe, the argument that the officers had no authority, as it is a specific announcement by the supreme government that this land could lawfully be sold by the officers who did sell it.

As to the proceedings in Mexico and what is said on that subject on page 54 of brief for the government, it is not true, we submit, that "the grantees have received all they bought and all they were entitled to under the laws of Mexico." This is not and cannot be true, on the theory that the land in the United States is not to be confirmed to them. The proceedings in 1882 were based on the theory that the grantees had in 1843 received all the land within the monuments of the grant, but had not paid for all. When Camou paid for the surplus, he owned, according to these Mexican proceedings, all the land, including, of course, the part in the United States. It is claimed, and is true, according to the Oury survey, that the Mexican survey of 1882 was incorrect, and that the surplus is larger than was stated and paid for in those proceedings. But this fact shows nothing more than that Camou owes the Mexican government a still further sum, if that government should hereafter determine that the surplus is larger than was paid for. What the government did in 1882 it can do again. It can take the map under which the grant is now claimed and determine that the surplus in Mexico is greater than it was calculated in 1882 to be, and can call on Camou for a further payment. If such further payment is made, Camou will then own the surplus, whatever it may be, and will remain the owner of the whole tract, including, of course, the part in the United States. If Camou should not care to pay for such surplus it can be sold to somebody else, but he will still remain the owner of his share of the land in our country. The Mexican proceedings were based, and any further proceedings will be based, on the theory that the land in the

United States has been paid for and received, and that the owner is not to be affected as to that. If such land is not confirmed to him and he is compelled to pay for or relinquish the surplus in Mexico, then the land for which he paid, that is, the part in this country, will be lost to him.

We have given this much time to the Mexican proceedings to show that no law of Mexico contemplates that grantees shall be deprived of any part of the land included within the monument of grants, though they may, under the laws passed long after the treaty, be compelled to pay for the surplus. Where a man intends to buy the whole of a tract of land, to compel him to give up any part utterly frustrates his purpose, and may, in fact, be the grossest injustice, for the reason that the tract may have a value to him as an entirety, whereas it may be of no value if a part is taken away.

If this grant had been accurately surveyed in 1841, and its contents accurately stated then, the purchasers would have paid for the correct contents and no discrepancy would have existed. If the survey had been correctly made in 1882, and the surplus correctly designated at that time, Camou would have been compelled to pay for the correct surplus, or relinquish it, and there would be no discrepancy, for the part in the United States would not be affected. The United States were not a party to the proceedings in 1882, instituted almost a generation after the treaty. If the grantee is in possession in Mexico of some surplus for which he has not yet paid in full, this can afford no justification for depriving him of land in the United States for which he has paid.

Suppose that in 1882 the Mexican officials had declared the surplus to be larger than it is now known to be, and had charged the applicant for more land than he had received, and he should present to the United States a claim based on the fact that he had, through the error of the Mexican officials, paid for more land in Mexico than he had received, and should

ask the United States to correct this error by giving him enough land in our territory to make good the amount for which he had paid in Mexico but had not received. Such a claim would be instantly pronounced visionary. He would be told that if any errors occurred in his dealings with Mexico, he must correct it with that government; that the United States had nothing to do with such transaction and could not remedy it in any form.

This is apparent, and the principle and reason of the case are just as clear that the United States are as much a stranger to the Mexican proceedings when it happens that the surplus was made too small as they would be in the case just supposed, where the surplus had been made too large. The rights of the grantees are that they now own the lands in the United States, for they have paid for them. One Camou also owns certain lands in Mexico for which he paid according to the proceedings of 1882, and is in possession of a certain other amount for which surplus, so far as the record shows, he has not paid. But this extra amount he is liable under the law of the State of Sonora to pay for if he retains it, in which event he ought to have it, or to relinquish it if he does not pay for it, in which event he will not have it, and in neither contingency will the land in the United States be affected in any respect, nor will any reason exist why he should not continue to own such land. If this land in the United States is not confirmed to him, when he pays, if he should, for the additional surplus in Mexico, he will have paid for the entire tract, but will have lost the part in the United States for which he paid, and any representation of this fact to the Mexican government would be met with the reply that it had nothing to do with the proceedings in the United States, and if the land there was wrongfully taken from him he must adjust that with the United States. If he should relinquish this additional surplus now known to exist, he will have paid, according to the proceedings of 1882, for all the land within

the monuments, but will have lost part, viz., the part in the United States. Let these Mexican proceedings be examined as closely as possible, let them be viewed in every light, and it will be seen that to deprive the grantees of the land in the United States will amount to a confiscation, even under the Mexican law, of such land. To preserve his rights, this grant must be confirmed.

Respectfully submitted,

ROCHESTER FORD,
Attorney for Appellants.

161 U.S. 208

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JAMES H. McKENNEY,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895

SANTIAGO AINSA, Administrator, *et al.*, *Appellants.*
vs.
THE UNITED STATES. *Appellee.*
No. 429.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT AND BRIEF FOR THE UNITED STATES.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895

SANTIAGO AINSA, Administrator, *et al.*, *Appellants.*	No. 429.
vs.	
THE UNITED STATES. *Appellee.*	

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

This is a proceeding on behalf of the Government, and was instituted by direction of the Attorney General in the Court of Private Land Claims under the third clause of Section 8 of the Act of March 3d, 1891 (26 Statutes at Large, page 854).

The petition of the Government alleges that the defendants hold and assert a claim to the premises in dispute under an alleged Mexican land grant, by virtue of the treaty of December 30, 1853, known as the "Gadsden Purchase," and that the title of said defendants is open to question in several particulars set out in the petition.

The public necessity for the institution of this proceeding is apparent as the grant includes the town of Nogales, a thriving town of 4500 population, lying on the border between the United States and Mexico, the line between the two countries dividing the town into two (nearly equal) parts; this being the case, it is impossible for those desiring to settle and improve the town to acquire any title to their property until the validity or invalidity of the claim of appellants is judicially ascertained and determined.

Separate answers were filed, one by Santiago Ainsa, administrator, and the other by Juan Pedro Camou and George H. Howard.

By each of these answers it is admitted that appellants claim the land as alleged in the petition, and each sets up and pleads his title and asks confirmation of his claim.

The answer of Camou and Howard further pleads as follows:

"That within the bounds natural objects and monuments set forth and established by said official survey there is an excess of ..... more or less, some 4,631 hectares, 21 aras and 47 centiaras or about .....

..... of such excess, surplus or demasias being in that portion of grant lying and being in the State of Sonora, all of which is set forth and shown in the resurvey of the grant, and plat thereof, had and made A. D., 1886, by the Mexican Government upon the petition of your petitioner, Camou, to purchase the said demasias that lay within the Republic of Mexico which said final sale and grant by said Republic of Mexico (to) petitioner Camou of said demasias within said Republic, and a final recognition expressly considered and given of the aforesaid original grant made A. D., 1843, by the Treasurer General, are contained, shown and set forth in the duly authenticated original testimonio which was made and delivered unto

the said Camou by the said Republic as complete and final evidence of title, a copy of which is filed herein and and herewith marked as "Exhibit B."

(See pages 14 and 15 of printed transcript).

Upon the trial, under direction of the court, appellants assumed the burden of proof and offered in evidence the titulo, a correct translation of which has, by stipulation, been made part of the transcript in this case, see supplemental transcript, pp. 1 to 20, from which it appears that on May 6th, 1841, there was presented to Jose Maria Mendoza, then Superior Chief of the Treasury of the Department of Sonora, a petition on behalf of Jose Elias and his parents for the resurvey of the ranch of "Casita," in order that they might be permitted to denounce and purchase the surplus lands therein, if any, and also for the survey, appraisement, etc., of the vacant public lands lying between the north boundary of "Casita," and the west boundary of the mission of Tumacacori and Calabazas; this petition was granted by the Superior Board of the Treasury of the Department of Sonora on May 22nd, 1841, and a resurvey of the ranch "La Casita" was ordered, as also a survey of the public land he sought to purchase, and said order directed that separate proceedings (*expedientes*) shouid be made of both operations.

This action of the board was certified to the Superior Chief of the Treasury on May 26th, 1841, and on the same day that officer commissioned Don Francisco Navamuel to make the surveys. By the order of his appointment he was required to comply with the provisions of the laws of Sonora, dated May 20th, 1825, and July 11th, 1834, and the order nowhere refers to any national

law. (See pp. 2 and 3 of supplemental printed transcript.)

The commissioner thus appointed proceeded to make survey of the ranch "La Casita," and then proceeded, as he reports, to make a survey of the vacant public lands petitioned for, and, without reciting his proceedings at length, it is sufficient to say that it appears from his report that he started at the north cross monument of "La Casita" and measured "along the public road that goes toward the north to the presidio of Tubac," 3/40 cords (17,000 varas) "which ended on the high road in a flat where a wide canyon, that comes down from the slope of the Pajarito Mountains terminates," where he ordered a mounument erected, "that of Calabasas being about 1000 steps further on * * * * * * *," and thence measured east 22 cords (1100 varas) to a hillock that had many oak trees on its slope, on the summit of which he "placed a pile of stones as a monument."

Then returning to the point at which the north monument was ordered to be erected in the high road, he measured west 50 cords (2500 varas) where he "reached very broken ground, which it was impossible to measure with a cord," when he "made scrupulous estimate of 150 cords (7500 varas) * * *" to where the Pajarito Mountains turn to the north near the place called Calaveras." He then returned to the place of beginning, and measured east 22 cords (1100 varas) which ended upon some hillocks at the trunk of an oak tree, where a pile of stones was placed, and from the same point he measured and estimated west 200 cords (10,000 varas) "which ended on a whitish ridge that has considerable pasture, near the so-called Planchas de Plata, which ridge

divides the streams that flow toward the ranch of Agua Caliente and those that go towards the Agua Zarca;" and this survey he reports contains 7½ sitios (Mexican square leagues). (See p. 8 of supplemental printed transcript.)

The land was then appraised in accordance with the State law of Sonora, at the price of $15.00 per sitio (the minimum price permitted by that law) less than four-tenths of a cent per acre (see page 9 of supplemental printed transcript) and publication was ordered, in accordance with the state law, for thirty consecutive days, the last publication being on December 10th, 1841, when proceedings were suspended on account on the non-appearance of Elias, the petitioner, until November, 1842, when the matter was referred to the Attorney General of the Departmental Treasury, as required by the law of State law Sonora, who after reciting the several steps taken, renders an opinion advising that sale be made to the highest bidder; in accordance with which opinion it was so ordered on January 5th, 1843, and after three public offers (required by the state law) the land was sold by a Board of Sale, composed of departmental officers and constituted as provided by the laws of the State of Sonora, to Don Jose Elias and his parents. The description of land offered was in this language: "There are going to be sold on account of the public treasury of the department, *seven and one-half sitios and two short caballerias* of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas in the upper Pima country."

The titulo then recites payment of the money into the

departmental treasury, whereupon, Ignacio Lopez, treasurer of the department purports to make a grant of the land thus sold "in the name of the Mexican Nation" on January 7th, 1843.

It will be noted that none of the proceedings are, or purport to be, in compliance with any federal law, nor did any federal officer participate in the proceedings, nor has the sale or grant received the approval of the nation or any officer of the nation.

Then follows a certificate of an entry in the provisional memorandum book showing that the purchase money and costs had been paid into the treasury of the department.

Appended to this titulo, appears the following certificate which was offered in evidence by all the defendants as a part thereof:

"By supreme resolution of this date the adjudication "of the land referred to in the title issued 7th of January, "1843, is approved under the provision of Article 3 of "the law of December 3rd, 1855, and is therefore legally "confirmed. And in witness thereof, and for the purposes "that may be necessary this endorsement is made in the "department of public works in Mexico on the 7th day of "July eighteen hundred and eighty-six.

M. FERNANDEZ,

Chief Clerk."

The testimony for appellants tended to show that the signatures of Ignacio Lopez in the titulo were genuine. Over the objection of the government, appellant Ainsa and one other witness were permitted to testify from a memorandum, which they testified was copied from the bottom

of page 64 of the "Toma de Razon," continuing on the reverse side, showing that on January 7th, 1843, there was issued a grant of seven and one-half sitios and two short caballerias of land for breeding cattle and horses contained in the vacant public lands that are situated between the north boundaries of ranch "La Casita" and the west boundaries of the Mission of Tumacacori and Calabazas, in the upper Pima country * * * in favor of Don Jose Elias and his parents * * * * * signed Lopez (Rubrica).

It is admitted that certain field notes and a plat thereto attached were made by a surveyor, now deceased, named Oury, and that, if living and present, he would testify that said field notes and plat contained a record of a correct survey of this grant according to the natural objects and other descriptions contained in the titulo introduced in evidence. (The field notes are on pages 50, 51. 52, 53 and 54 of printed transcript and the plat is between pages 126 and 127 of same).

This was all the evidence on the part of appellants.

The testimony on behalf of the government tended to show that by a correct measurement, commencing at the north cross monument of the ranch "La Casita" and measuring north along the Tubac road 340 cords of 50 varas each, the measurement would terminate in the Republic of Mexico, three and fifty-four hundredths cords (about 411 feet) south of the line between Mexico and the United States. (See page 61 of printed transcript).

That according to the survey made by Mr. Oury, offered in evidence by appellants, there were within the exterior boundaries named in the titulo and within the pres-

ent boundaries of Mexico 12.21 sitios, or about 52,969.25 acres, and within the exterior boundaries named in the titulo and within the boundaries of the United States 5.96 sitios, a total of 18.17 sitios (78,830 acres) within the exterior boundaries named in the titulo, and that 7½ sitios contained 32,744 acres. (See pages 59 and 60 printed record.

That none of the monuments referred to in the titulo are now in existence, and that the monuments now found on the southern boundary of the grant being the south cross monument, the southeast monument and the southwest monument are of stone and mortar in the shape of a truncated cone, about six feet high and eight feet in diameter, have been recently constructed and are evidently new monuments.

That the so-called north cross monument consists of a mound of earth and pebbles about eighteen inches high ten or twelve feet in diameter, one large stone eleven or twelve inches square on which is marked "N. de E. N. X.," and has not the appearance of being a monument. It appears more like an ant hill, about twenty steps from there is one just like it except the stone, and an experienced surveyor gave it as his opinion that it was not a monument at all, and the northeast monument is a recently constructed pile of stones without mortar, about four feet in diameter, built in circular shape. (See pages 61 and 62 of printed transcript).

That the southwest corner now claimed is not where it ought to be, as described by the titulo, and that no such place as "Calaveras," named as one of the calls for the

northwest corner of this claim, was known in that part of the country. (See page 66 of printed transcript).

The United States also offered in evidence a transcript of the proceedings (*expedente*) referred to at length in the answer of appellants Camou and Howard (see pages 14 and 15 of printed transcript) being the same proceedings resulting in the superior order of July 7th, 1886, a certificate of which was endorsed on the titulo of the Los Nogales de Elias claim, introduced in evidence by all the defendants, from which proceedings it appears that on August 11th, 1882, Jose Camou, Jr. (through whom Juan Pierre Camou and George H. Howard and other defendants claim) presented to the district judge at Hermosillo a petition alleging that he was a Mexican citizen, and that he was the owner of the ranch known by the name of "Los Nogales de Elias" situate on the boundary line of Mexico and the United States of America, between the ranches "La Casita," "Tumacacori" and "Calabazas" the overplus of which he denounced and sought to purchase under article 8 of a general law of July 22d, 1863, "with the understanding that if the other co-proprietors of said ranch "Nogales" desire to share in this overplus I do not object that the adjudication may be made in favor of all the owners thereof in the proportion to which they are entitled, provided they contribute to the expenses of the same."

On August 17th, 1882, it was ordered by the district judge of Sonora that the denouncement above referred to be admitted, and citizen Florencia Rosas be appointed as commissioner with instructions to resurvey the ranch called "Los Nogales de Elias," the overplus of which is applied for, and he was required to report the true area

of the ranch, and the overplus (demasias) in the same in case any may result within "its monuments," and was required to proceed under the law of July 20th and August 2d, 1863.

This instrument further recites that in compliance with the order of the district judge he notified the parties in interest and the owners of the adjoining lands and proceeded to a resurvey of the ranch of "Los Nogales de Elias" according to its monuments and exterior boundaries as described in the titulo of that grant, and found within such exterior boundaries and monuments an excess within the Republic of Mexico of 4631 hectares 21 aras and 47 centiares (2.64 sitios, or 11,443.73 acres) over and above the 7½ sitios sold in 1843.

The report of this survey was regularly made to the district judge and by him referred to the Chief of the Treasury, acting as Attorney General, by whom it was advised that the said 4631 hectares &c., be adjudicated to Jose Camou, Jr., subject to the approval of the department of public works to which the entire matter was referred.

The department of public works required some further explanation of the survey, which was given by Rosas on January 15th, 1886, when the matter again came before the department of public works for approval, which gave the following opinion:

"To the District Judge of the State of Sonora, Guaymas:

This department having examined the proceedings which the district court transmitted with its official communication of the 1st of February, and which were had on the report of the denouncement made by Jose Camou,

Jr., of the overplus (*demasias*) in the ranch known as the Los Nogales, situated in the district of Magdalena, in the State of Sonora, and report of the result having been made to the president, he has been pleased to direct that you be ordered to suspend approval of the adjudication until it becomes known whether or not it prejudices the growing town of Nogales, and likewise until the validity and legality of the title under which it is pretended to hold said ranch is established, substantiation which is so much is so much more necessary, as there depends upon it not only the proof that there is an overplus (demasias), but also whether Mr. Camou can sell lands to the railroad company and to those who desire to locate in said town, whose progress encounters an obstacle in the exaggerrated pretentions of Mr. Camou as has been manifested to this department in various communications that have been directed to it, it being a fact that everyone doubts the legality of the title alleged by Camou. That in regard to this doubt there is reason to entertain it, inasmuch as in said proceedings of denouncement, when giving the statement of the proceedings, it is stated textually:

'I hereby state that I have seen, read and returned to the party interested, the authenticated copy of the title of ownership of seven and a half square leagues, short, which was issued to Jose Elias Gonzales and Mrs. Balbanera Redonda, in the city of Arizpe, by the Departmental Treasurer of Sonora, on the 7th of January, 1843;' this statement disclosing the fact that the origin of the property or the original title was vicious and null, as the sale was made and the title issued by a Departmental Treasurer, and in the year 1842, when the bases of Tacubaya were in force—that is, when the national government was not only central, but dictatorial—which two circumstances gave the title in question the character of manifest nullity, since, notwithstanding the law of the 3d of December, 1855, repealed those of the 25th of November, 1853, and the 7th of July, 1854, it declared, nevertheless, in Article 3 that the alienations of public lands made by the authorities of the departments under the central system without the authorization or consent of the supreme government and by those of the States in contravention of the law of August 18th, 1824, were null and of no value, and that in

consequence the holders of that class of lands were liable to the penalties provided for those who acquired property in an illegal and fraudulent manner unless they obtained the approval of said Supreme Government. On this supposition, and it not appearing in the title of Nogales that it was given with the authorization or consent of the government, nor likewise that its approval had been obtained, it follows directly that the qualification of null is applicable to it and to the holder, the penalties to which under said article he is liable; and if this is so it will be necessary not only to refuse the adjudication of the so-called overplus (*demasias*), but also to seize the part which is pretended to make pass as private property and to obligate the holder to the indemnification of the damages he has caused to the public treasury by retaining and using the land that belongs to it, and all this knowingly, because the aforesaid laws were duly promulgated, and because further, the circular of the 4th of October, 1856, called attention to them and warned holders of this class of lands that if they did not apply for the confirmation of their titles, for that reason alone the lands would be considered national lands."

The whole matter was then again referred to the district judge and the objections made by the department were obviated in the following manner:

First. By securing an order on July 7th, 1886, from the President of the Republic of Mexico approving the original grant of "Los Nogales de Elias" and being the same order endorsed on the titulo offered in evidence by the appellants. (See supplemental printed transcript, page 20).

Second. By satisfying the Mexican authorities that by reason of a contract with the New Mexico and Arizona Railroad Company, any difficulty in the progress and growth of the Mexican town of Nogales was obviated.

These objections having been removed, the above

named surplus or overplus (*demasias*) was regularly sold and granted to Jose Camou, Jr., and he paid therefor the sum of $555.74 and costs.

Upon this evidence the court entered a decree for the United States, declaring the claims made by the various defendants without merit and the same were disallowed, and the following opinion was rendered:

IN THE COURT OF PRIVATE LAND CLAIMS.

UNITED STATES OF AMERICA *vs.* SANTAIGO AINSA, ADM'R., *et al.*	No. 29. Los Nogales de Elias Grant.

Opinion of the Court.

We are clearly of the opinion that under the proceedings the right of the grantee was limited to the specific amount of land mentioned in the proclamation of sale and the grant. The patent or grant is the evidence of his title—that is, it operated to convey to him the only rights which he acquired in the property under the proceedings. It was based upon the sale and the payment by him of the purchase price; and the sale was by its amount a specified quantity or amount of land, and that was what he paid for. It seems to us impossible that his rights could be enlarged beyond the express terms of the sale and grant by the proceedings which preceded the sale. Those proceedings were essential under the law. They did not, however, constitute the sale, and were merely preliminary to it. The sale occurred when the property was stricken to the petitioner and he paid the purchase price into the treasury. When he paid for the specified quantity of land which was stricken off to him at the sale and accepted a grant or conveyance of the quantity, his rights, we think, are necessarily limited to that quantity.

We do not dispute the correctness of the rule laid down in the cases cited by counsel, neither are we in conflict with that rule. The rule undoubtedly is that when a conveyance is by metes and bounds a recital as to the quantity supposed to be contained in the area does not limit the grant, but the grantee takes all within the boundaries. But here the grant is of a specific quantity, included within specific boundaries, and by the express language of the grant the quantity is made the controlling matter of the description, and the intent of the granting officer to reserve to the Government the excess over the amount granted within the boundaries is as clearly manifested as it could have been made by a reservation in express language.

It was contended, however, that a grant such as we hold this to be is unknown to the Mexican law, and therefore it cannot be presumed that the officers intended to make one of that character, but what was actually effected by the sale and grant is to be determined from the language made use of, and we have no occasion to inquire into the power of the officers to do what they clearly show they did do. It remains to be determined whether the defendants are entitled to a confirmation as to any lands under the grant. It appears from the evidence that a parallelogram, 340 cordels and 222 cordels in width, measured from the point designated by the commissioner as the essential point of the survey, would be partly within the Territory of Arizona and partly within the State of Sonora. But upon what principle can it be said that the petitioner acquired title to own the grant to that tract? The grant was specific as to quantity, but not as to location. The only effect of the proceeding was to designate certain outboundaries within which the quantity of lands granted was to be located. Of necessity the exact location was to be determined by some subsequent action of the parties. But no such action was ever taken. At the time of the treaty of cession the grant had not been located within the meaning of that instrument, and hence by its express terms it cannot now be recognized as of any validity. It is not such a grant as by the terms of the

treaty the United States is bound to recognize and confirm and that by the terms of the act under which this court is constituted is the test of the rights of the parties.

JOSEPH R. REED,
Chief Justice.

Decision rendered March 30, 1894.
Filed March 30, 1894.

POINTS.

Upon this record appellee contends:

I.

The public lands in Mexico were always the property of the nation, and any grant made without its authority is void, certainly so since the law of April 4, 1837.

II.

Whatever may have been the merits of the dispute between the Mexican nation and its several political subdivisions as to the right to sell the public lands and to receive the proceeds, the question, so far as the United States is concerned, is settled by the decree of Santa Anna of November 25, 1853, and, by the treaty, this Government is not bound to recognize any grant not made either by previous authority or with the subsequent approval of the Mexican Nation.

III.

The evidence in this case does not show that this grant was recorded, as required by the treaty of December 30, 1853.

IV.

This grant, if valid, was a grant of a specific quantity of land, and not of the entire eighteen leagues contained within the exterior boundaries, and not having been located at the date of the treaty, and having since then been definitely located by the Mexican Republic entirely within that country, such definite location is binding upon all holding under the grant, and so far as it is sought to affect that portion within the United States should be rejected.

BRIEF.

I.

(*a*) None of the laws cited in the titulo as authority for the grant, vested or attempt to vest in the States or departments any title or interest in the property.

Article 11, Decree No. 70 of August 4th, 1824.
(Erroneously cited as of August *10th*, 1824).
Legislacion Mexicana, Vol. 1, page 710.
(See pages 1 and 2 of appendix).

Article 1–2 Decree of April 17th, 1837.
Legislacion Mexicana, Vol. III., page 363.
(See pages 9 and 10 of appendix).

Article 3, Law of January 17th, 1837.
Legislacion Mexicana, Vol. III., page 260.
(See pages 7 and 8 of appendix).

Decree of December 28th, 1839.
(Erroneously cited as of April 28th, 1839).
Legislacion Mexicana, Vol. III., page 674.
(See page 13 of appendix).

Decree of December 24th, 1840.
Legislacion Mexicana, Vol. III., page 753.
(See page 13 of appendix).

(*b*) The Mexican Nation, notwithstanding the law classifying the revenues, always claimed and exercised the right to regulate the sale and colonization of the public lands, both before and since the treaty of 1853.

Colonization Law of August 18th, 1824.
Legislacion Mexicana, Vol, I. page 710.

Law of March 12th, 1828, Art. 6, 7, 8, 9, 11.
Legislacion Mexicana, Vol. II., page 64.
(See pages 2 and 3 of appendix).

Law of April 25th, 1835.
Legislacion Mexicana, Vol. III., page 42.
(See pages 3 and 5 of appendix).

Law of October 3d 1835, Article 1, 2 and 3.
Legislacion Mexicana, Vol. III., page 75.
(See pages 5 and 6 of appeneix).

Law of October 23d, 1835, Article 8, 9, 10, 14.
Legislacion Mexicana, Vol. III., page 89.
(See pages 6 and 7 of appendix).

Law of December 30th, 1836, Article 1.
Legislacion Mexicana, Vol. III., page 258.
(See page 7 of appendix).

Law of January 16th 1837, Article 3.
Legislacion Mexicana, Vol. III., page 260.
(See pages 7 and 8 of appendix).

Law of April 4th, 1837.
Legislacion Mexicana, Vol. III., page 352.
(See page 8 of appendix).

Decree of April 12th, 1837, Article 7.
Legislacion Mexicana, Vol. III, page 359.
(See page 9 of appendix).

Law of April 17th, 1837, Articles 1 and 92.
Legislacion Mexicana, Vol. III, page 363.
(See pages 9 and 10 of appendix).

Law of September 15th, 1837, Article 7.
Legislacion Mexicana, Vol. III, page 630.
(See pages 10 and 11 of appendix).

Law of June 1st, 1839, Articles 1 and 7 clause 16.
Legislacion Mexicana, Vol. III, page 624.
(See page 12 of appendix).

Decree of June 13th, 1843, Article 134, clause 5.
Legislacion Mexicana, Vol. III, page 442.
(See page 13 of appendix).

Decree of December 9th, 1843, Article 1.
Legislacion Mexicana, Vol. IV, page 666.
(See page 14 of appendix).

Decree of December 29th, 1843, Articles 1, 2 and 3.
Legislacion Mexicana, Vol. IV, page 722.
(See page 14 of appendix).

Decree of November 27th, 1846, Article 1.
Legislacion Mexicana, Vol. V, page 217.
(See page 15 of appendix).

Regulations of December 4th, 1846, Preamble.
Legislacion Mexicana, Vol. V, page 229.
(See page 15 of appendix).

Decree of May 18th, 1847, Article 11.
Legislacion Mexicana, Vol. V, page 275.
(See page 16 of appendix).

Decree of May 14th, 1851.
Legislacion Mexicana, Vol. VI, page 76.
(See pages 16–19 of appendix).

Decree of November 25th, 1853.
Legislacion Mexicana, Vol. VI, page 776.
(See pages 19 and 20 of appendix).

II.

The decree of Santa Ana correctly declared the law in respect of grants attempted to be made under the central system, as it had always been, and has ever since been recognized in Mexico, and it is also conclusive upon the Mexican Nation, and all holding under it as being a law, made by the regularly constituted authority of that nation, in force when the treaty was made, and hence as binding as though incorporated in the treaty itself.

Decree of November 25, 1853.
Legislacion Mexicana, Vol. VI, page 476.
(See pages 19 and 20 of appendix).

Decree of July 7, 1854, Articles 1, 2, 5 and 8.
Legislacion Mexicana, Vol. VII, page 228.
(See pages 20 and 21 of appendix).

Decree of December 3, 1855, Article 1, 2 and 3.
Legislacion Mexicana, Vol. VII, page 627.
(See pages 21 and 22 of appendix).

Doe vs. Braden, 16 Howard, 635.

I Kent's Commentaries, pages 166 and 167.

Vattel on Law of Nations, Chap. 2, Sec. 14.

(Chitty's Ed. of 1885, page 436).

III.

The grant was not "duly recorded" as required by the treaty.

Mumford vs. Wardell, 6 Wall, 423.

U. S. vs. Knight, Admin., 1 Black, 251 and 252.

IV.

This was a grant of a certain quantity, within certain exterior boundaries set out in the grant papers.

U. S. vs. McLaughlin, 127 U. S., 428.

Hornsby vs. U. S., 10 Wall, 232.

Carpenter vs. Montgomery, 13 Wall, 480.

ARGUMENT.

I.

ORIGIN OF TITLE TO PUBLIC LANDS IN MEXICO.

Upon the independence of Mexico the title to the public lands vested in the supreme government of that nation as they had theretofore existed in the Kingdom of Spain.

U. S. vs. Morehead, 1 Black, 242.

U. S. vs. Castillero, 2 Black, 371.

The Mexican Republic was not made up of different sovereign states as was the original government of the United States, but on the contrary, its independence was declared as a whole, out of which the States were carved, hence whatever title the States had to the public lands, or whatever of right they had to dispose of them, must have been granted by the Nation as such.

U. S. vs. Morehead, *supra*.

This is conceded, but appellants invoke the provisions of the law of August 4th, 1824, classifying the revenues of the Nation, which law is as follows:

"ARTICLE 1. The following belong to the general revenues of the Federation: import and export duties now established or which shall hereafter be established, under whatever denomination, in the ports and frontiers of the Republic.

2. The tax on imports of fifteen per cent., which shall be collected in said ports and frontiers, of the tariff prices increased one-fourth on foreign goods, which shall by reason of said tax be exempt from the excise tax in their circulation in the interior.

3. The revenue from tobacco and powder.

4. The excise tax paid on tobacco in the districts where cultivated.

5. The revenue from the postal service.

6. That from lotteries.

7. That from saltworks.

8. That from the territories of the Federation.

9. National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs or shall hereafter belong to the public exchequer.

10. The buildings, offices and the lands attached thereto, which belong or have belonged to the general revenues and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the Federation.

11. The revenues not included in the foregoing articles belong to the States.

(See pages 1 and 2 of appendix.)

And appellants claim that by section 11 of that law the revenue derived from the sale of the public lands, not being one of those reserved to the Nation, belonged to the several States, and it is asserted that the law of Sonora of 1825, and the law of the same State of 1834, with reference to the sale of lands (see appellants' brief, pp. 46 to 55) were made by virtue of the right to the revenues arising from the sale of lands, vested, in the States by the revenue act of August 4, 1824.

Assuming that the laws of Sonora of 1825, cited in the appendix to appellants' brief, and the laws of Sonora of 1834 were passed by the virtue of the national law of

August 4, 1824, *supra*, that law, so far as it applies to these lands, was repealed by the provisions of the law of January 17, 1837.

Article 3 of which is as follows:

"3. There are adjudicated to the bank for a redemption fund:

First. All the real property (*bienes raices*) of the Nation that exists in all the territory of the Republic.

And the subsequent act of April 12th, 1837, article 7 of which is as follows:

"ARTICLE 7. For a greater security in the payment of the capital and interest of the consolidated fund, the Government of Mexico, specially mortgages, in the name of the Nation, one hundred million acres of public lands, in the Departments of Californias, Chihuahua, New Mexico, Sonora and Texas, as a special guarantee of said fund, until the total extinction of the credits; *but if any sale of these mortgaged lands should be made it shall be at least, at the rate of the said four acres per pound sterling*, and the proceeds thereof shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the correspondent warrant, and the latter shall employ the proceeds of the sale to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands, at the current price of said bonds in the market."

And the act of April 17th, 1837, re-classifying the revenues, which is as follows:

"ARTICLE 1. Until the general congress establishes the revenues that are to form the national exchequer in all the Republic of Mexico, the revenues, taxes and property (*bienes*) of which the supreme government is in possession shall continue and the revenue, taxes and property

(*bienes*) which the departments established or acquired under the federal system and which existed at the time of the publication of the decree of October 3d, 1835.

2. *The revenues, taxes and property, which by the law of the 17th of last January were assigned to the National Bank, are excepted from the provisions of the last article until it fulfills its object.*"

Thus it will be seen that long prior to the inception of this grant, and long prior to any attempt on the part of the officers of the department of Sonora to make it, all authority derived from the law of August 4, 1824, had been withdrawn from the State and department.

And if it be urged that the authority to pass the law of Sonora of 1825, and that of 1834 upon the same subject, were derived from the colonization law of August 18th, 1824, that law was expressly repealed by the law of April 4th, 1837, (see page 8 of appendix) which provides that all enactments on the subject of colonization are repealed in so far as they conflict with the provisions of that law; which law provides for the application of the proceeds of the sales of the lands of the republic to the payment of the national debt, and fixes the price at which they are to be sold at not less than one dollar and twenty-five cents per acre. In other words, the Government contends that the laws of Sonora of 1824 and 1834 with reference to the sale of the public lands, whatever might have been their force up to the time of the creation of the central government, were absolutely repealed by the provisions of laws passed during the first four months of 1837, and from that time had no validity, and gave to the officers of the department of Sonora no authority whatever to sell the public lands.

The strength of this position will be the more manifest when the history of the matter is considered. By the constitution of 1824, a federal system was adopted, and this system remained until October, 1835, when the State legislatures were abolished, the whole system of government of the Mexican Nation changed, the existence of the states themselves, as such, was destroyed, and in their place departments created, and in place of the state congresses Departmental Boards. From this time until 1846 through various revolutions and tribulations, the Government of Mexico was central in its character, and during a portion of that time was under the control and government of an absolute dictator. During the existence of this central system it became necessary to provide for the security and ultimate payment of a large public debt, and to redeem a certain class of debased coin, then almost the entire currency of Mexico, in order that the country might have such financial standing among the nations of the world as would give it character and credit. For this purpose a system of national banking was created by the act of January 17, 1837, and all the real property of the Nation was adjudicated to the bank for a redemption fund, and in order to make this adjudication effectual, on April 4, 1837, the colonizations laws were all repealed.

The law of April 4, 1837, is as follows:

"The government, in accord with the council, shall proceed to make effective the colonization of the lands (*terrenos*) that are or should be the property of the Republic, by sales, leases (*enfiteusis*) or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the

national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of Independence and for the remuneration and gifts congress may grant to Indian tribes and nations, and those who assisted in the restoration of Texas, *and it shall not be compromised by the laws enactad heretofore on colonization, which enactments are all repealed in so far as they conflict with this law*, but the prohibition of article 11 of the law of April 6, 1830, shall remain in force."

Thus was wiped out the last vestige of any authority to make sales or grants of public lands, for any purpose, by virtue of any law passed by the former States, and from that time no power can be shown in any departmental officer to make such sales or grants *under any law*.

Again as to the state (or department) of Sonora, the act of August 18, 1824, and the law of Sonora of 1825, and the law of Sonora of 1834, were each and all repealed by the provisions of articles two and three of the general law of April 25, 1835, which are as follows:

"2. In exercise of the powers the general government reserved to itself in article 7 of said law of August 18th, 1824, the border and litoral States are prohibited from alienating their public lands (*terrenos*) for colonization thereon, until the rules they shall observe in doing so are established

"3. If any of them desire to alienate any part of their public lands they shall not have the power to do so without the previous approval of the general government, which, in every case, shall be preferred if it sees fit to take them, and shall give the States the proper indemnity."

It will be noted that this law was passed before the abolition of the States, and that by it Sonora, as one of the litoral States, was positively prohibited from alienating

her public lands without the approval of the general government, thus absolutely repealing the laws of the State of Sonora of 1825 and 1834, under which it is claimed this grant was made.

The first thing to be investigated when passing upon the validity of a public grant of lands is the authority of the officers who attempt to make it. If they have no power to pass title to the public lands, every one is conclusively presumed to know it, and the doctrine of *caveat emptor* applies with reference to this as well as all judicial sales. The officers of the Department of Sonora, it is conceded, proceeded under the provisions of the laws of the then extinct State of Sonora of 1825 and 1834. These laws having been expressly repealed, and the States which passed them having been absolutely prohibited from making further colonization of the public lands, and from alienating the same without the consent of the General Government and the lands themselves having been adjudicated by the supreme power of the nation to other purposes and mortgaged for the national debt, with provisions for their disposition at a price much greater than that authorized by the former laws of Sonora, the authority of these officers if any they ever had had ceased long before the inception of this grant.

The officers of these departments were creatures of the statute, and the same statute which created the officers prescribed their duties and defined their powers, and by the Constitution of 1836 it is provided that the departmental officers "*cannot exercise any other authority than those which are designated by law.*"

Then these departmental officers had no authority by

virtue of their office to sell these lands without express authority of the Supreme Government. There was no law giving them any such power, and their attempt to do so was clearly a violation of the plain provisions of the constitution, and, as was said by the Secretary of the Department of Public Works, when passing on this very title, this fact "gives the title in question the character of manifest nullity." (See page 119, printed transcript).

Again, is it reasonable that in the same nation there should be two systems for the disposition and sale of the same class of lands, one by the nation at a minimum price of one dollar and twenty-five cents per acre, and another by the several states, or departments at a minimum price of less than four tenths of a cent per acre? And was it lawful for the Mexican nation, even had it attempted to do so, to authorize the officers of the departments to sell the public lands, which had been solemnly adjudicated and mortgaged, at a price less than one per centum of that which it had solemnly promised should be charged for the lands if sold?

It will not be presumed that a nation violated its obligations, or permitted their violation by its officers, and any law, had one been passed, which attempted to authorize the course pursued by the officers of the department of Sonora in the sale of these lands, would have been scrutinized most closely by the courts when its construction was the subject of investigation. Much less will the courts imply a power in the officers of the department to violate the express inhibition of a statute as well as the solemn adjudications and obligations of the national government.

We insist most earnestly that the attempted grant by the officers of the department of Sonora was not only without authority of law, but was in absolute violation of it, and this was the law of Mexico and has ever since been so held in that country.

On November 25th, 1853, when the government of Mexico was central and dictatorial, a decree was promulgated by the dictator, articles 1, 2 and 3 of which are as follows:

"Antonio Lopez de Santa Anna, etc.

"ARTICLE 1. It is declared that the public lands (*terrenos*), as the exclusive lands of the nation, never could have been alienated, under any title, by virtue of decrees, orders and enactments of the legislatures, governments, or local authorities of the States and Territories of the republic.

"2. Consequently, it is also declared that the sales, sessions or any other class of alienations of said public lands (*terrenos*) that have been made without the express order and approval of the general powers in the manner prescribed by the laws, are null and of no value or effect.

"3. The officials, authorities and employes, upon whom devolves the execution of this decree, shall proceed, as soon as they receive it, to recover and take possession in the name of the nation of the lands comprehended in the provisions of article 1, and that may be in the possession of corporations or private individuals, whatever may be their prerogatives or position."

At that time the dictator was exercising supreme legislative and executive authority, and at that very time was recognized by the political department of this nation as having such supreme authority. In Mexico as in other countries, having the civil law it was the duty of the legislative department of the government to construe and declare constitutional or invalid as the case might be, all

laws passed by the nation or any of the States during their existence. In the exercise of this jurisdiction Santa Anna by this decree declared that the very laws of Sonora of 1825 and 1834, about which so much is said in brief of counsel for appellants, furnished no authority for the alienation of the public lands.

Again, by the decree of July 7th, 1854 (See appendix page 20), "the alienations of public lands of whatever nature they may be, that have been made by the authorities and officials of the departments without the knowledge and approval of the general government during the epoch when the central system was in force in the Republic are (declared) void."

This decree made by the same authority under the same circumstances is binding upon this government as an adjudication, not as forfeiting any titles, but as a declaratory law, declaring what the law was and always had been.

Again, by the decree of the general congress of the Mexican Republic of December 3d, 1855 (See appendix pages 21 and 22), after the federal system had been reinstated, and while the government of Mexico was constitutional, and as nearly Republican in form as it ever was, the federal congress declared that all sales of lands under the central system with the express authority or consent of the supreme government, were valid, but that all alienations of public lands made by the authorities of the States, or without the above requisite, are void and of no value, and the holders of that class of lands are subject to certain penalties therein named.

These three decrees, made as they were at different

times and by different authorities, each of them being declaratory in form, is certainly persuasive evidence to the courts of this country as to what the law was in that, and if not binding as adjudications they are entitled to great weight as authority, especially where, as we have attempted to show, these decrees are in strict conformity to the statutes of that country.

II.

DECREE OF SANTA ANA.

With reference to the decree of November 25, 1853, *supra*, it will be noted that this was issued and promulgated while negotiations for the treaty were being carried on. It is recited in the treaty, and is an historical fact, that the proposal on the part of the United States to enter into it, was made on the 25th day of September, 1853, and from that day until December 30th, 1853, when the treaty was signed, negotiations between the two countries, with reference to its subject matter were pending. The history of the country shows that in 1848 the same two countries had made a treaty for the cession of lands contained in other portions of the Mexican Nation, and that out of the treaty, many difficulties had arisen with reference to the power of the different local authorities to make grants, and the United States had been subjected to expensive litigation and often times to the loss of large districts of territory on account of grants made by officers whose authority was at least open to question; it was also doubtless well known that the local authorities had claimed the

right to make grants of public lands and had in some instances assumed to do so; and it was probably anticipated by the minister who made that treaty on the part of the United States that just such claims as this, made upon just such grants as this would doubtless be presented for action by this government, and this matter being discussed between the high contracting parties, resulted in the declaratory law last quoted, and this law having been made and promulgated pending the negotiations for the treaty and being at the date of the treaty a law in force in Mexico, must be taken as a part of the treaty itself, and as binding upon the Mexican Nation and on those holding under it; for whatever of right claimants in this or any other case have for confirmation of their title, they have by virtue of our stipulation with the Mexican Nation as such; they as private individuals have no contract with this government, and can only assert their claim by virtue of the stipulation of the treaty; and any stipulation made in the treaty by the Mexican Nation, however wrongfully it may affect the individual rights of citizens of that Nation, is binding upon such citizens, and the question of the right to make it, is one between the Mexican Nation and its own citizens.

In principle this case cannot be distinguished from the case of Doe vs. Braden, 16 Howard, 635.

That was an action in ejectment and involved the construction of the treaty with Spain, by which Florida was ceded to the United States.

The plaintiff claimed under a grant from the King of Spain to the Duke of Alagon. The treaty was signed February 22, 1819, and negotiations commenced on the

24th day of January, 1818. The date of the grant to the Duke of Alagon was February 6, 1818.

It seems that the fact that this and other grants had been made, pending these negotiations, came to the knowledge of the secretary, acting for the United States, and he insisted upon an express condition being inserted in the treaty that all grants made since January 24, 1818, should be null and void.

It was conceded in this case, that this stipulation of the treaty was within the power of the King of Spain, notwithstanding the existence of the grants made prior to the date of the signature of the treaty; but before the final ratification of the treaty, it transpired that the Duke of Alagon intended to rely upon a royal order of December 17, 1817, as sufficient to vest in him the title to the land, and the secretary being informed of this claim, in order to place the matter beyond all controversy, requested and received a written admission from the Spanish Minister, that three grants, including the one in question were understood to be annulled by the 8th article of the treaty, and it was negotiated and signed, with this mutual understanding between the negotiators; and this admission was finally ratified by both parties to the treaty.

In that case it was claimed that the King of Spain, by the Constitution under which he was then acting and administering the government, had no power to annul this grant, by treaty or otherwise, and that if the power rested anywhere, it existed in the Cortes, and the court say (See p. 657):

"But these are political questions and not judicial. They belong exclusively to the political department of the Government.

By the Constitution of the United States the President of the United States has the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. And he is authorized to appoint embassadors, other public ministers and consuls, and to receive them from foreign Nations; and is thereby enabled to obtain occurate information of the political condition of the Nation with which he treats, who exercises over it the power of sovereignty, and under what limitations, and how far the party who ratifies the treaty is authorized, by its form of government, to bind the Nation and persons and things within its territory and dominion by treaty stipulations. And the Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land.

The treaty is therefore a law, made by the proper authorities and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms."

It is provided by subdivision 1 of section 13 of the act of creating the court of private land claims (see 26 Statutes at Large, p. 854) that:

"No claim shall be allowed that shall not appear upon a title lawfully and regularly derived from the Government of Spain or Mexico or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect * * * the claimant would have had the lawful right to make perfect had the territory not been acquired by the United States * * *."

The words "usages and customs" and "the principles of equity" used in the California Act of 1851, do not occur in this act, and it will be presumed that they were intentionally omitted, and under this act no grant can be confirmed unless *lawfully and regularly* made, and if

incomplete it must appear that the claimant could have gone into the courts of the former government, and demanded as a *right* (not out of mere grace or favor) that this claim be made perfect, had the United States not acquired the territory.

This being the case, the question arises: "What were the legal rights of the claimants at the date of the cession?" And this question can only be answered by ascertaining what the law of that country was at that time, hence every law in force in Mexico on December 30, 1853, entered into and became a part of the treaty, as much so as though bodily incorporated therein.

It cannot be claimed in this case that this decree was void on the ground that Santa Anna had usurped the powers of the government, because as is held in the Braden case, *supra*, that was a question for the political department of the Government, and that branch having recognized him as the head of the Government, the treaty making power, such recognition is absolutely binding on all other branches; and as is said by Mr. Chancellor Kent:

"The power to make treaties must be co-extensive with all the exigencies of the nation and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers."

I Kent's Commentaries, p. 166.

And as the history of the country shows that Santa Ana was the *de facto* head of the government of Mexico

it was not for this Government to interfere with or inquire into the domestic affairs of that nation; for

"A treaty is valid and binding on the nation if made with the present ruling power of the nation, or the government *de facto*. Other nations have no right to interfere with the domestic affairs of any particular nation or to examine and judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession."

I Kent's Commentaries, p. 167.

Vattel in his work on the law of nations, in discussing this subject, uses this language:

"When an unjust conqueror or any other usurper has invaded the kingdom, he becomes possessed of all the powers of government, when once the people have submitted to him, and by voluntary homage acknowledged him as their sovereign. Other States, as having no right to intermeddle with the domestic concerns of that nation, or to interfere in its government, are bound to abide by her decision and to look no further than the circumstance of actual possession. They may therefore broach and conclude a treaty of peace with the usurper.

Vattel on the Law of Nations, chap. 2, sec. 14, Chittey's Ed. of 1835, p. 436.

III.

WAS THIS GRANT DULY RECORDED?

A marked difference between the treaty of Guadalupe Hidalgo and that of December 30th, 1853, is

that the latter requires that the grant shall be "duly recorded in the archives of Mexico."

A proper construction of this provision of the treaty requires that the existing state of the law should be considered, that is to say, the laws of the country in which these records or archives were to be found. It is well known as a matter of history that the manner of preserving records of grants and other important instruments in Spain and Mexico was different from that which obtains in this country, and that the customary manner of preserving records of proceedings leading up to a grant in Mexico was to deposit the original in the archives and to give to the proper party a copy of such original, which was known as the testimonio, duplicate or second original. There was also a requirement that a memorandum of the grant should be entered in the proper book called "Toma de Razon," and when a history of the original proceedings (*expediente*) was properly deposited in the archives and a minute of the grant entered in the "Toma de Razon" this constituted the record of the grant, and when these two steps had been taken the grant had been "duly recorded" as provided by the treaty, and until both these steps had been taken the grant had not been "duly recorded."

The evidence in this case fails to show in any satisfactory manner that either of these steps had been taken. It is true that two witnesses testified to having found at page 64 of the "Toma de Razon" a memorandum of the issuance of this grant. Whether it appeared at the proper place, under the proper date and was either actually or apparently a genuine entry, is not shown, either by the

evidence of these witnesses or by any other evidence. It is also true that there appears in the transcript (page 126) a certificate of an entry in the "Toma de Razon," certified to on the 2d day of September, 1879, which appears from the transcript to have come from the office of the surveyor general. How this entry came in the transcript does not appear, but, however this may be, the certificate is subject to the same objections as evidence as the testimony of the witnesses above referred to, in this, it does not appear that the entry is taken from the proper place in the book of "Toma de Razon," nor that the same was entered in the proper chronological order with other similar memoranda made at that time, nor is the genuineness of the entry in any way attested, but on the contrary it appears on the face of this certificate that the entry is on page 45 of a certain book, while the recital in the titulo offered in evidence in this case is that the memorandum of the title of this claim was entered at page 64 of a book. In short, the evidence taken altogether of the condition of this book, the "Toma de Razon," is unsatisfactory and wholly fails to show that this grant was "duly recorded" as required by article 6 of the treaty.

Another requirement was that the original history of the proceedings which led up to and authorized the issuance of the title should be deposited in the archives and there remain as a record. The evidence in the case not only wholly fails to show that this requirement of the Mexican law was complied with, but it is expressly admitted that no such instrument is now in the archives, and it appears affirmatively that as early as 1854 no such original history, *expediente*, or matrix, was in the archives of Mex-

ico (see page 27 of printed transcript). It is true that it is claimed that the proceedings of that time had been carried to the City of Mexico in 1852, but if this be true, it was as easy to prove that the original was in the City of Mexico as to show that it was in Hermosillo, and as has been held by this court, the mere fact that a portion of the records are absent from the proper archives is not admissible to show the existence of that record, unless it be further shown by competent testimony that the archives at one time contained such record (see U. S. vs. Knight, Administrator, 1 Black 251 and 252).

Of this fact there is an entire absence of testimony, and hence we contend that a compliance with the requirement of the treaty that the grant shall have been "duly recorded," which requirement is made a part of the act creating the Court of Private Land Claims has not been shown in this case, and that for this reason alone the grant should be rejected.

Mumford vs. Wardell, 6 Wall., 423.

IV.

WAS THIS A GRANT OF A SPECIFIC QUANTITY OF LAND?

Even if it be conceded that this was a valid grant, made by the proper officers, and duly recorded it was clearly a grant by quantity, and not a grant of the entire territory included within the exterior boundaries as recited. It would seem that this is sufficiently shown by the fact

that it was a sale of so many sitios at so much per sitio, and that if the grantee received the amount of land that he paid for, he is in no position to complain, especially where he paid only the minimum price fixed by the (alleged) law under which he purchased; but counsel for appellants with reasoning which is more plausible than sound, endeavors to defeat the force of this position by alleging, first, that the grant of a certain quantity of land to be located within exterior boundaries was not known to the laws of the "*state of the west*," and second, that juridical possession of this entire grant was delivered to the grantee, and that this operated to segregate the entire tract from the public domain, and to vest the title thereof in the grantee. Admitting, as we do, the plausibility and force of this argument, we can but express regret that the facts in this case should so wholly fail to support it.

In the first place, the very first prayer of the petition filed with the superior chief of the treasury as a basis for this grant, admits the existence of just such a grant in Sonora, namely, the Casita; for if the Casita was not a grant of a certain quantity within exterior boundaries, why should Don Jose Elias desire a *re-survey* (mark, not a survey) in order that he might be permitted to purchase the demasias, or overplus lands therein?

Again, the construction of this very grant by the Mexican Government in 1882 and in 1886, whatever may be said of its binding force as an adjudication, is certainly persuasive authority in the courts of this country as to its proper construction under Mexican law, and by that adjudication, as well as by the admission of defendant Camou, this very grant is declared to be a grant by

quantity within the exterior limits, fixed by the natural objects and other descriptions of the boundary. This court has stated repeatedly with reference to Mexican grants that "concessions by leagues was the rule, and one extending to indefinite outboundaries, the exception." (U. S. vs. Pacheco 22 How. 227) And that "the greater number of Mexican grants which have come before this court for examination have belonged to the second class." (grants by quantity within certain exterior boundaries.) See Hornsby vs. U. S. 10 Wallace 233. And we know of no fact, either in evidence or history, if we omit the bare assertion of eminent counsel for appellants, which should lead this court to believe that grants in Sonora were an exception to this general rule.

It is urged by counsel for appellants that "the whole of the tract was petitioned for." This may be conceded, and it is probably true that the petition for a Mexican grant should, regularly, describe all the land granted, but it by no means follows that the authorities must grant all the land petitioned for; that they did not do so, appears in the large number of cases wherein Mexican grants have come before this court for construction.

Counsel for appellants also contend that the whole of the tract was ordered to be surveyed. Even if this were true, a mere order of survey, without either an actual survey or a purchase and sale, is not sufficient to pass title to land described in the order.

The record shows conclusively that it was not, and it is fairly to be inferred from this record that the tract was never surveyed at all, and that the surveyor was never upon the grant. It has been held by this court that recitals in the

return of the surveyor which were evidently false were of themselves sufficient to show that no actual survey had ever been made of the grant.

This is further shown by the very indefinite and uncertain statement as to the western boundary, which it is conceded the surveyor never visited. It was shown by the evidence that the call for the northwest corner of this grant was false, and that the southwest corner, now claimed, is not where it should be, as described in the titulo.

Again, the description itself, as contained in the petition and order of survey, is no description at all. How a surveyor would proceed to measure the land included between the *north* line of one tract and the *west* line of another is past all understanding.

It is further shown that none of the original monuments are now in existence, and it is shown that they were not in existence in 1882. (See pages 104 and 106 of the printed transcript). The uncertainty and indefiniteness of this alleged survey is further shown by the fact (if true, as claimed by appellants) that a survey in 1843 disclosed only 7½ sitios; that a survey in 1882 disclosed about 13 sitios, and another survey introduced in the evidence by appellants, made in 1891, discloses over 18 sitios. These facts of themselves are sufficient to make what might otherwise be a perfect title an imperfect one, and to require another authentic survey to show what was the whole of the tract appraised land was actually granted, and upon such a survey it is clear that a purchaser would have no right to demand any more land than he bought.

Carpenter vs. Montgomery, 13 Wallace, 480.

The minimum price at which this land could be appraised and sold was fifteen dollars per sitio. The price paid for this land was a little over one hundred and thirteen dollars. Now, outside of the recitals in the grant itself, outside of the return of the surveyor, outside of the certificate of the appraisers, it is a mere question of mathematics, as to how much was appraised. Certainly only 7½ sitios could have been appraised to have arrived at this result. But this is not all. The appraisers were directed to appraise only 7½ sitios. (see commission of apprasers, page 9, supplemental printed transcript) and their return shows what they did appraise, and is as follows:

"Thereupon said citizens * * * appeared and stated that after having conferred and being well informed as to the provisions of section 4, article 64 and 65 of the organic law of the treasury (see pages 52-3 of appellants' brief) they would appraise, and in fact, oave appraised, the *seven and onehalf sitios of land* for raising cattle at the rate of fifteen dollars ($15), because they are all dry * * * * the total value of said *seven and one-half sitios* amounting to one hundred and twelve dollars (112-4) and four reals. * * * *."

Certainly nothing can be plainer than that these appraisers intended to appraise only 7½ sitios. Nothing can be plainer than that they did appraise only 7½ sitios.

The order for these publications is as follows: "In the town of Magdalena. on the fifteenth day of the month of November, 1841, *the sitios* surveyed for Don Jose Elias and Don Francisco Gonzales having now been appraised, I stated that it was my duty to order, that they be published by the public crier for thirty consecutive days * * * *" (See page 9 supplemental transcript).

The first public auction was as follows:

"In the City of Arizpe, on the fifth day of the month of January, 1843, the Board of Sales assembled in the office of the treasury of this department, * * * said board ordered that at the sound of the drum a publication be made to the public by the public crier, which the public crier, Victor Escalante, thereupon did in a clear and loud voice, saying: There are going to be sold, on account of the Public Treasury of the department *seven and one-half sitios and two short caballerias* of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the Mission of Tumacacori and Calabazas * * * and appraised at one hundred and thirteen dollars one real and ten grains" (see page 14 of supplemented printed transcript) * * *."

[It will be noted that after the appraisement and before the auction sale of these lands the appraisement had been increased from $112.00 and four reals to $113.00 one real and ten grains.]

The order striking off and selling the property to the purchasers, being at the third auction, is as follows, after reciting the assembling of the board the crier cried out as heretofore:

"There are going to be sold on account of the Public Treasury of the department, *seven and one-half sitios and two short caballerias* of land * * * Thereupon Ignacio Santos Elias, in the name and as the agent of Don Jose Elias and of his parents * * * came forward and again offered for his principals the $113.00 one real and ten grains in which the land was appraised, and, the hour for mid-day prayer of this day having already struck, the public crier for the last time said: "Once, twice, three times; sold, sold, sold; may it do much good, good, good to Don Jose Elias * * *. In these terms this act was terminated and there were pub-

licly and solemnly sold *the seven and one-half sitios and two short caballerias* of land for raising cattle and horses" (see pages 15 and 16 supplemental printed record).

And the grant itself was substantially in the same language (see page 17 supplemental printed record), which is as follows:

"Therefore, by virtue of the authority which the laws, regulations and superior orders that govern in the matter confer on me, by these presents, in the name of the Mexican Nation, I grant, in due form of law, *seven and one-half sitios and two short caballerias* of land for raising cattle and horses, contained in the vacant public land situated between the boundaries of Casita and those of the Mission of Tumacacori and Calabazas * * *."

With reference to this particular subject matter, counsel for appellants, cite the case of White vs. Brunley, 20 Howard, 235. In that case a private person sought to raise the question that a survey of a Mexican grant contained an excess over the quantity said to be contained therein by the surveyor, and the court holds that this is a question that cannot be raised by a private individual, but clearly intimates that in a proper case the government may interfere for the protection of the public domain, and cites in support of its position United States vs. House, 11 Howard, 552. It is true that the latter case is a proceeding in equity, based upon alleged fraud, but if after the issuance of a patent the government could interfere by a bill under such circumstances, how much more has it a right to confine a Mexican grantee to the amount of land he bought and paid for, where the grantee, or his assigns, are attempting to take from the public domain, under a

claim of purchase, a large area of land which they never bought and for which they never paid one cent.

Counsel for appellant further urge that if there were any doubts as to how much was sold, the practical interpretation of the parties themselves is entitled to great, if not controlling weight. We concede this proposition. The parties to this grant were the Government of Mexico and Don Jose Elias. The law under which it was made fixed a minimum price of fifteen dollars per sitio, and the officers had no right to grant it for less. If they had construed this grant to contain eighteen sitios, or the entire land within its exterior boundaries, they would have had no power to accept $113.00 as its purchase price. This court will not presume that those officers failed to perform their duty, and will not presume that they intended to sell eighteen sitios for a little more than one-third the price fixed by law. This is a practical and co-temporaneous construction of this grant so far as the officers were concerned. So far as Don Jose Elias is concerned, he knew that he could not buy the land for less than fifteen dollars per sitio, and knew that he was only buying seven and one-half sitios of land.

And as to the successors to the rights of these parties, their construction is entitled to some weight. On the one side, the successor of the Mexican Nation is the Mexican Republic and on the other side, the successor of the original grantee is Mr. Camou. This grant was again construed by these parties in 1882 by Mr. Camou by filing a petition asking for a re-survey, and that he might be permitted to purchase all the land then included in the Mexican Republic in excess of seven and one-half sitios;

and the Mexican Republic, the successor of the other party, put its construction upon the grant by granting the petition, ordering its re-survey, setting out to the successor of the grantee the exact seven and one-half sitios bought and paid for by Elias, and selling to Camou the overplus, nearly five sitios, for which Mr. Camou paid over $555.00. Thus, we have an interpretation, and it seems to me, a very practical interpretation of this contract by the parties to it, and by their successors, and applying the doctrine quoted by counsel for appellants, for which there is abundant support, the case of Topliff vs. Topliff, cited by him, we ask that the interpretation be given "*controlling weight.*"

It seems to us that the case U. S. vs. McLaughlin, 127 U. S., 428, is in point in this csae. The description of the grant construed in that case is as follows: "Eleven square leagues on the River Moquelamos bordering on the north upon the southern shore of said river; on the east upon an adjacent ridge of mountains; on the south upon the lands of Mr. Quenock, and on the west upon the estuaries of the shore." The quantity of land contained within the boundaries given in this decription was about eighty leagues, and the court holds that that was a grant of eleven leagues only, and not a grant of boundaries. It is true in that case there was no pretense of a survey, but why a survey should make any difference, unless accompanied by some juridical act, we are unable to perceive. In other words, whether the exterior boundaries are fixed by looking at them, without a compass in your hand, or with one, it seems to us can not make any difference. In

either case the intention is clear to prescribe where a man shall take his land. The quantity of land is fixed by the contract of purchase and sale, and by the words of the grant.

The case of Hornsby vs. The United States, 10 Wallace, 232, seems to me is also authority directly in point in favor of the construction of this grant as a grant by quantity, and not of the entire area of land included within the very indefinite exterior boundaries.

If, then, this be a grant of seven and a half sitios only, with the right to locate it within the exterior boundaries, it clearly not having been located prior to December 30th, 1853, it is just such a grant as the Court of Private Land Claims is prohibited from confirming.

Article 6, of the Treaty of 1853, is as follows:

"No grants of land within the territory ceded * * * bearing date subsequent to the day—25th day of September, when the minister and subscribers to this treaty on the part of the United States proposed to the Government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, *or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.*"

(See Article 6, Treaty of 1853, 10 Statutes at Large, p. 1035).

Here again will be noticed a distinction between the treaty of 1853 and that of 1848. There was no requirement in the treaty of Guadalupe Hidalgo that the land granted should have been located prior to the treaty, the result of which was that large masses of land, particularly in California, were reserved from settlement and sale by reason of being within the exterior boundaries of some

Spanish or Mexican land claim, and to guard against a repetition of such litigation as followed the conclusion of that treaty, this provision was inserted in the treaty of 1853. A comparison of the provisions of the two treaties will clearly show this distinctive difference. It is a universal rule of construction of all contracts and agreements of particular force when construing the solemn act of two sovereign nations, that every sentence, every phrase, every word contained in the instrument shall be given some meaning, if possible; particularly is this the case where two instruments of similar character have been made between the same parties, one of which differs from the other. In such case courts must conclusively presume that for some good reason such a difference was made, and must give force and effect to the difference, if possible. In this case, one difference between these two treaties is the use of the word "locate," and in compliance with well settled rules of construction it is the duty of this court to give that word some meaning. Now, what can it mean, unless it applies to a grant like this?

It cannot apply to a general float, that is to say, to a grant of indefinite quantity of land with the right to locate it anywhere, for such grants have been universally held to be void by this court without any such word in the treaty; and there is no class of grants to which these words can apply, except to that most common class of grants of a specified quantity of land within exterior boundaries containing a larger quantity. If, then, as has already been said, this be a grant of seven and one half sitios of land to be located within exterior boundaries containing eighteen sitios, and the same was by the terms of the treaty required to be

located before it could be recognized by this government, and if, in fact, it had not been located prior to 1853, these facts make it unlawful for the Court of Private Land Claims to confirm this grant, and this court is no less bound by the provisions of law creating the court from which this appeal is taken.

But it is contended by counsel for appellants, that juridical possession of this grant was given to the grantee and that this fixed the boundaries of the grant and vested in him a perfect title to the entire tract. This argument would have come with better grace, would have had more weight and would be entitled to more consideration if counsel had pointed out in the record in this case the evidence of delivery of juridical possession; by what officer was this possession delivered? On what day? Who was present? Where was the delivery? and where is the evidence that it was delivered at all?

The record is entirely silent on this subject. Counsel for appellants seems to assume that the fact that a surveyor went upon the land and sighted a surveyor's instrument, and pointed it over the top of the Parjato Mountain was a sufficient act of juridical possession, and in support of this position cites a remark of Mr. Justice Field in the case of Graham vs. United States, 4 Wallace, 259. But we think counsel for appellants mistakes the meaning of the remark made in that case, as we do not understand the case to hold that the mere preservation of a record of measurement, and other steps of the proceedings attested by witness and furnishing a copy to the grantee, to be the ancient judicial act known as the delivery of juridical possession; nor do we understand that the preservation of such record

so attested and furnishing a copy, has the same sacred weight that was and is given to the delivery of juridical possession; the one is the act of a mere clerk, or clerical officer, the other is a judicial act and one invariably performed by some magistrate having judicial functions, and as we understand the judge to say in that case, was "usually taken by the magistrate of the vicinage with assisting witnesses in the presence of the adjoining land proprietors who were summoned for the occasion."

And was invariably and necessarily the final and concluding act of the granting power.

Now, we would like to know at what particular time this land was segregated from the public domain. Was it at the date of the survey? That was two years before the date of the sale, before the land had been bought or paid for, and certainly juridical possession was not, and could not, have been delivered until the land was bought and paid for. When, then, was this act of juridical possession performed, and by whom? What judicial officer, or magistrate, performed it? In the presence of what witnesses, and what adjoining proprietors were called to be present? These solemnities were important, and when performed give great weight to the act.

It is objected by counsel for appellants that the *expediente* of the proceedings of 1882–6 (see pages 99 to 125 of the printed record) was improperly admitted in evidence, especially as against defendant Ainsa. It will be noted that Camou was a party to the proceeding, and hence it is certainly binding upon him as an admission, and also as a judicial determination of his rights, but we hold that it was admissible against and binding upon all the

defendants. They introduced in evidence as a part of their titulo a certificate from M. Fernandez, chief clerk (see page 20 of supplemental printed record), showing the confirmation of the grant made in 1843, by the "Supreme resolution" of July 7, 1886. This was introduced without objection on the part of the United States, and appellants having introduced it, it was perfectly competent for the United States to introduce a history of the proceedings which led up to that "*supreme resolution.*"

Again, it has been frequently held by this court that where a grant is made of a specific quantity within exterior boundaries containing a larger quantity, it is for the government making the grant to locate that grant within such exterior boundaries. When the territory purchased by the United States in 1853 was ceded to this country, the right to definitely locate such floating grants in respect of territory ceded, passed to the United States. This particular grant was divided into two parts by the boundary line agreed upon under the treaty, and enough territory within the exterior boundaries of this grant remained within the Republic of Mexico to satisfy this grant. As was well said in the case of U. S. vs. McLaughlin (*supra*):

> "If the government has the right to say where it shall be located, it certainly has the right to say where it shall not be located, and if it sells land to a third person at a place within the general territory of the original grant it is equivalent to saying that the quantity due the original grantee is not to be located there."

Applying this well settled rule to the grant under consideration, the Mexican government had a right to say where, within the exterior boundaries, the seven

and one-half sitios granted should be located, and had a like right to say where it should not be located, and having ceded to this government that portion of the grant north of the boundary line retaining enough within its own territory to satisfy this grant, this action is "equivalent to saying that the quantity due to the original grantee is not to be located there." Further, by retaining a portion of the land within the exterior boundaries of this grant, Mexico retained jurisdiction to definitely locate the seven and one-half sitios within the exterior boundaries, of that portion of the entire tract remaining in that nation if it saw fit. Such a proceeding would be a proceeding *in rem*, and jurisdiction of the *res* fixed the jurisdiction to act. Having jurisdiction of the property, and having acted within the bounds of its jurisdiction over the subject matter, the action of the Mexican Nation is absolutely binding upon the parties holding or claiming any interest in that property as an absolute final judicial determination of all their rights. It is insisted that those proceedings having been had subsequent to the treaty, are of no binding force upon this government, or upon parties claiming under the treaty. This would be undoubtedly true had the entire tract within the exterior boundaries of this grant passed to this government by the treaty, but, as we have shown, the Mexican Nation retained jurisdiction of its land and the right to locate this float upon it, and having done so their action is certainly binding within the nation, and if binding in that nation where the property is situated, and where the proceedings was had, and being a proceeding *in rem*, it is binding upon all parties owning or claiming an interest in that property the world over. If

this be not true, what is the result? Camou could go to Mexico and have his 7½ sitios confirmed by that nation, and such confirmation would, in equity, inure to the benefit of all his co-tenants, and Mr. Ainsa could come before the courts of this country and have that portion of this land included within the exterior boundaries lying in the United States confirmed to him by the courts of this country, and this confirmation would inure to the benefit of Mr. Camou, and thus a grant originally intended to be, and in fact being, for 7½ sitios only, would be converted by the acts of these courts into a grant for fifteen sitios. It cannot be that such construction is correct.

But whether the acts of the Mexican Republic in 1886 is binding upon claimants in respect of the land ceded to this government by the treaty or not, such act of the nation which made the grant, requiring as it did a construction of the same grant now being construed by this court, is certainly persuasive authority as to the correctness of that construction. The Mexican Nation is presumed to understand their laws; it is presumed to understand and correctly construe the official and recorded acts of its officers, and as this titulo must be construed in accordance with the laws of Mexico, no better authority as to the proper construction to be given to it could be cited to this court than the solemn act of the Mexican Nation in construing this identical instrument.

We assert, and assert without fear of succeseful contradiction, that nearly every grant made in the State of Sonora, and in every other State and Territory in Mexico, is, according to Mexican law, a grant by quantity. Such is the construction given to these grants in that country, and

so universal is this construction that there are special statutes now in force providing for the re-survey of any grant which is believed to contain more than the *quantity* named in the titulo. (See act of July 22, 1863.) And long prior to the passage of that act, it is well known in the history of Mexico that it was the custom of the Government, at any time that it saw fit, upon its own motion, or upon the petition of the owner, or upon the petition of third parties who might wish to purchase the land, to direct a re-survey of any grant of public land made in that territory, just as they did in 1841 in respect of the ranch La Casita, and as they did in 1882 in respect of this grant, and confine the grantee to the quantity of land he had bought, or which had been given to him as the case might be, which was known as the *fundo legal* or *cabida legal*, and to permit him, if he so desired, to purchase the *demasias*, *sobrante*, or overplus, and if he declined to do so it became public domain and was sold to other parties.

We refer to portions of the opinion of Surveyor General Wasson upon this question, introduced in evidence in this case by appellants, which are as follows:

(See pages 25 and 28 of the printed transcript): "This is a grant for the exact quantity of seven and a half square leagues and two short caballerias, notwithstanding the petition was for the vacant land lying between the northern boundary of the Casita and the western boundary of the ranch of Calabasas and Mission of Tumacacori.

* * * * * *

To show what importance the Mexican authorities attached to the quantity or area of grants of land, it is only necessary to refer to the action of the promotor fiscal

(attorney general) in his review of the proceedings of valuation by the appraisers. All the land petitioned for was found by the appraisers to be desert or without water; therefore, under the law, the valuation was at the rate of fifteen dollars for each square league, the aggregate being stated by these officials to be $112.50. This valuation was acquiesced in through all subsequent proceedings until the case reached the promotor fiscal, who noted and corrected the omission to value the two short caballerias, and reported the true valuation to the treasurer general to be $113.12½ and ten grains, and this slightly augmented sum was exacted in payment, and the grant was executed for the definite quantity heretofore stated."

In conclusion we most respectfully urge that the departmental officers who made the grant had no power to make it under the law of Mexico in force at the time it was made without the approval of the supreme government, of which there is no claim by appellants.

Appellants have no claims as against this government by reason of the decree of November 25th 1853, declaring what the law of that nation was, and on the faith of which the treaty of December 30, 1853 was made.

The grant was not duly recorded at the date of the treaty.

The persons under whom appellants claim only bought seven and one-half sitios, only paid for seven and one-half sitios, and the land thus bought was not located at the date of the treaty.

The Mexican Nation has fully satisfied this grant, has, for itself and within its own border, given to appellants all the land they are entitled to, and they are in no position to invoke the stipulations of the treaty.

It is respectfully submitted that the decree is for the right party and should be affirmed.

HOLMES CONRAD,
Solicitor General.

MATT. G. REYNOLDS,
Special Assistant to the Attorney General.

L. F. PARKER,
of Counsel.

APPENDIX.

Classification of General and Special Revenues.

Legislacion Mexicana, Vol. I, P. 415, No. 710.
Decree of August 4th, 1824.

Article 1. The following belong to the general revenues of the Federation: import and export duties now established or which shall hereafter be established, under whatever denomination, in the ports and frontiers of the Republic.

2. The tax on imports of fifteen per cent., which shall be collected in said ports and frontiers, of the tariff prices increased one fourth on foreign goods, which shall by reason of said tax be exempt from the excise tax in their circulation in the interior.

3. The revenue from tobacco and powder.

4. The excise tax paid on tabacco in the districts where cultivated.

5. The revenue from the postal service.

6. That from lotteries.

7. That form saltworks.

8. That from the territories of the Federation.

9. National property, in which is included that of the inquisition and temporal property of the clergy, or any

other rural or urban property that belongs or shall hereafter belong to the public exchequer.

10. The buildings, offices and the lands attached thereto, which belong or have belonged to the general revenues and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the Federation.

11. The revenues not included in the foregoing articles belong to the States.

PASSPORTS AND ACQUISITIONS OF PROPERTY BY FOREIGNERS

Legislacion Mexicana, Vol. II, P. 64, No. 557,
Law of March 12th, 1828.

* * * * * *

ARTICLE 6. Foreigners who have entered and established themselves in conformity with the prescribed regulations or those which shall hereafter be prescribed, are under the protection of the laws and enjoy the civil rights the latter concede to Mexicans, except the right to acquire rural landed property, which those not naturalized cannot acquire under existing laws.

7. Those lands (*terrenos*) that belong to silver reduction works and are necessary to carry on the provisions of the law of October 7th, 1823, in regard to the acquisition of mining shares, are not included in the exception of the foregoing article.

8. The colonization law of August 18th, 1824, remains in force.

9. Foreigners not naturalized may also undertake the purchase and colonization of lands (*terrenos*) of private ownership; but in this case the special permission of the general congress shall be obtained, if the purchase and colonization be in the territories, and of the corresponding congresses if in the States.

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11. The properties acquired by foreigners not naturalized, in violation of the law, are denounceable by any Mexican, to whom they shall be adjudicated when the violation is proven.

* * * * * *

NULLIFIES A DECREE OF THE LEGISLATURE OF COAHUILA AND TEXAS.

Legislacion Mexicana, Vol. III, P. 42, No. 1552.
Law of April 25th, 1835.

ARTICLE 1. The decree of the legislature of Coahuila and Texas of March 14th of the present year is, in its articles 1 and 2, contrary to the law of August 18th, 1824; consequently the alienations made by virtue of said decree are null and of no value.

2. In exercise of the powers the general government reserved to itself in article 7 of said law of August 18th,

1824, the border and litoral states are prohibited from alienating their public lands (*terrenos*) for colonization thereon, until the rules they shall observe in doing so are established.

3. If any of them desire to alienate any part of their public lands, they shall not have power to do so without the previous approval of the general government, which, in every case, shall be preferred if it sees fit to take them, and shall give the States the proper indemnity.

4. The general government can, under articles 3 and 4 of the law of April 6th, 1830, by virtue of its preference right, purchase of the State of Coahuila and Texas the four hundred *sitios* it says it is under the necessity of selling.

The decree cited in article 1 of the preceding law is the following:

"Supreme government of the free State of Coahuila and Texas.

The Governor ad interim of the State of Coahuila and Texas, exercising the supreme executive power, to all the inhabitants thereof, know ye:

The Constitutional Congress of the free, independent and sovereign State of Coahuila and Texas has seen fit to decree:

ARTICLE 1. The government can dispose of as much as four hundred *sitios* of land (*tierras*) of the public lands (*baldios*) of the State, to meet the public exigencies in which it is at present situated.

2. It shall prepare regulations for the colonization of said lands (*terrenos*) under the bases and conditions it may deem proper, without regard to the provisions of the law of March 26th of last year.

3. The government shall provide the necessary means for the collection of whatever is due the State whatever be its nature and origin.

Monclova, March 14th, 1835."

ABOLISHES STATE LEGISLATURES AND ESTABLISHES DEPARTMENTAL COUNCILS.

Legislacion Mexicana, Vol. III, P. 75, No. 1626.

Law of October 3d, 1835.

ARTICLE 1. The governors who at present hold their offices in the States shall so continue, even when they have completed the terms previously established in their constitutions, but subject, in their continuance and in the exercise of their functions, to the supreme government of the nation.

2. The legislatures shall discontinue at once the exercise of their legislative functions; but before dissolving and after calling together those that have adjourned, they shall appoint a Departmental Board, composed for the present of five individuals selected from their own body or out of it, to act as the council of the governor. In case this office is vacant they shall propose to the supreme government such persons as have the qualifications which have been required heretofore; and until the goverment makes an appointment they shall perform the functions of government through the first one of the laymen named.

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3. In the States where the legislatures cannot assemble with eight days, the Common Council of the capital shall act in its stead, solely for the purpose of electing the five members of the Departmental Council.

BASES FOR THE NEW CONSTITUTION.

Legislacion Mexicana, Vol. III, P. 89, No. 1637.
Law of October 23d, 1835.

* * * * * *

8. The national territory shall be divided into Departments on the basis of population, locality and other contributing circumstances; their number, extent and subdivision shall be given in detail in a constitutional law.

9. For the government of the departments there shall be Governors and Departmental Boards; the latter shall be elected by popular vote in the manner and number the law shall provide, and the former shall be appointed periodically by the supreme executive power, upon nomination by said boards.

10. The executive power of the departments shall reside in the governor in subordination to the Supreme Executive of the Nation. The Departmental Board shall be the Council of the Governor; they shall be charged with determining and promoting whatever conduces to the welfare and prosperity of the departments, and shall have the economic, municipal, electoral and legislative powers the special law for their organization shall provide,

being in regard to the exercise of the latter class subordinate and responsible to the General Congress of the Nation.

* * * * * *

14. A law shall systematize the public exchequer in all its branches; shall establish the method of accounts; shall organize the tribunal for the revision of accounts and regulate the economic and contentious jurisdiction in this department.

DIVISION OF THE TERRITORY OF MEXICO INTO DEPARTMENTS.

Legislacion Mexicana, Vol. III, P. 258, No. 1807.
Law of December 30th, 1836.

ARTICLE 1. The Territory of Mexico is divided into as many departments as there were States, with the following modifications:

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ESTABLISHES A NATIONAL BANK FOR THE REDEMPTION OF COPPER COIN.

Legislacion Mexicana, Vol. III., P. 260, No. 1811.
Law of January 17, 1837.

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3. There are adjudicated to the bank for a redemption fund:

First. All the real property (*bienes raices*) of the nation that exists in all the territory of the Republic.

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COLONIZATION OF THE LANDS OF THE REPUBLIC. REPEALS ALL FORMER LAWS ON COLONIZATION.

Legislacion Mexicana, Vol. III., P. 352, No. 1847. Law of April 4, 1837.

The government, in accord with the council, shall proceed to make effective the colonization of the lands (*terrenos*) that are or should be the property of the Republic, by sales, leases (*enfiteusis*) or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of Independence and for the remuneration and gifts congress may grant to Indian tribes and nations, and those who assisted in the restoration of Texas, and it shall not be compromised by the laws enacted heretofore on colonization, which enactments are all repealed in so far as they conflict with this law, but the prohibition of article 11 of the law of April 6, 1830, shall remain in force.

CREATING A NATIONAL CONSOLIDATED FUND.

Legislacion Mexicana, Vol. III, P. 359, No. 1852. Decree of April 12, 1837.

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ARTICLE 7. For a greater security in the payment of the capital and interest of the consolidated fund, the Government of Mexico, specially mortgages, in the name of the nation, one hundred million acres of public lands, in the Departments of Californias, Chihuahua, New Mexico, Sonora, and Texas, as a special guarantee of said fund, until the total extinction of the credits; but if any sale of these mortgaged lands should be made it shall be at least, at the rate of the said four acres per pound sterling, and the proceeds thereof shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the correspondent warrant, and the latter shall employ the proceeds of the sale to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands, at the current price of said bonds in the market.

REVENUES AND REVENUE OFFICERS OF THE GOVERNMENT. CREATES SUPERIOR CHIEFS OF THE TREASURY.

Legislacion Mexicana, Vol. III, p. 363, No. 1855. Decree of April 17th, 1837.

ARTICLE 1. Until the general congress establishes the revenues that are to form the national exchequer in all the Republic of Mexico, the revenues, taxes and property (*bienes*) of which the supreme government is in possession shall continue and the revenues, taxes and property

(*bienes*) which the departments established or acquired under the federal system and which existed at the time of the publication of the decree of October 3d, 1835.

2. The revenues, taxes and property, which by the law of the 17th of last January were assigned to the National Bank, are excepted from the provisions of the last article, until it fulfills its object.

CONVENTION MADE BETWEEN ENGLISH HOLDERS OF THE MEXICAN BONDS AND THE MEXICAN GOVERNMENT.

Legislacion Mexicana, Vol. III, P. 628, No. 2056. September 15th, 1837.

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7. For greater security in the payment of the principal and interest of the consolidated fund, the Mexican government, in the name of the nation, specifically mortgages one hundred million acres of public lands (*tierras baldias*) in the departments of the Californias, Chihuahua, New Mexico, Sonora and Texas, as a special guarantee of said fund, until the total extinction of the credits; but if any sale of the mortgage lands (*tierras*) should be made, it shall be made at least at the rate of said four acres to the pound sterling, and the proceeds shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the corresponding inscriptions, and they shall use the proceeds of the sale to redeem the bonds of the new consolidated fund, which may also be received in payment of said lands (*tierras*) at the price said bonds have in the market.

The Mexican government, besides the general mortgage contained in this article, expressly reserves by a public decree twenty-five million acres of the lands (*tierras*) of the government in the departments of closest communication with the Atlantic, and which appear most suitable for colonization from the outside. Said lands (*tierras*) shall be specially and exclusively set aside for the deferred bonds, in case it is desired to exchange them for lands (*tierras*); and if the government sells them, the proceeds therefrom shall be devoted to the redemption of said bonds.

PRESCRIBING TAXES FOR THE YEAR 1838.

Legislacion Mexicana, Vol. III, P. 444, No. 1901. Law of December 23, 1837.

ARTICLE 1. The taxes that existed on the last day of December of the present year of 1837 are continued for the year 1838. This continuation is understood notwithstanding the interpretation congress shall make of articles 28 and 44 of the third constitutional law, for the following years.

PRESCRIBING TAXES FOR THE YEAR 1839.

Legislacion Mexicana, Vol. III, P. 570, No. 2011. Law of December 18th, 1838.

The taxes for the following year shall be the same as those that now exist as permanent taxes, without prejudice

to the other taxes that may be decreed by congress, or levied by the government under the authority given it for that purpose.

APPROVES CONVENTION MADE IN LONDON WITH HOLDERS OF MEXICAN BONDS ON SEPTEMCER 15TH, 1837.

Legislacion Mexicana, Vol. III, P. 624, No. 2056.
Law of June 1st, 1839.

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ARTICLE 7. * * * *

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Sixteenth. For strict compliance with the stipulations in articles 4th, 5th and 6th of the convention, and with the provisions of articles 3rd, 4th, 5th and 6th of the foregoing law, there shall be created, as soon as possible, by the proper ministry, a bureau of colonization under the immediate orders of the supreme government, composed of three persons instructed in the branches it comprises, which shall be charged with the survey of the lands, designation thereof, rules for making colonization effective, and other operations that should be performed, bearing in mind to that end and observing article 6th of the decree of April 12th, 1837, which has been admitted and remains in force in said convention.

Decree of December 28, 1839.

In the year 1840 the existing taxes and those decreed in the present year, 1839, shall continue, without prejudice to the interpretation spoken of in article 1 of the law of December 23, 1837.

Decree of December 24, 1840.

ARTICLE 1. The existing taxes and those decreed in the present year, 1840, shall continue in the year 1841.

2. This continuation is understood notwithstanding the interpretation referred to in article 1 of the law of December 24, 1837.

BASIS FOR THE ORGANIZATION OF THE REPUBLIC.

Legislacion Mexicana, Vol. IV., P. 442, No. 2576.
Law of June 13, 1843.

ARTICLE 134. The powers of the Departmental Assemblies (*Assembleas*) are:

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V. To decree what is convenient and in harmony with the laws with respect to the acquisition, alienation and exchange of the property (*bienes*) that may belong to community of the Department. As to the alienation of lands, the existing laws and what the colonization laws provide shall be observed.

PUBLIC LANDS APPLIED TO THE REDEMPTION OF COPPER COIN.

Legislacion Mexicana, Vol. IV, P. 666, No. 2719.

Decree of December 9th, 1843.

ARTICLE 1. The value of the public lands (*terrenos*) not on the frontier and not affected by any other obligation is applied to the payment of the credits caused by the redemption of copper coin.

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CONSTRUES ARTICLE 1, OF THE DECREE OF DECEMBER 9TH 1843.

Legislacion Mexicana, Vol. IV, P. 722, No. 2739.

Decree of December 29th, 1843.

ARTICLE 1. It is declared that the meaning of article 1 of the decree of the 9th instant mortgages for the payments of the credits caused by the redemption of copper coin only a portion of the public lands (*terrenos*) equivalent in value to said debt.

2. The government reserves to itself to indicate, as soon as the regulations referred to in article 2 of said decree are made, which are the lands (*terrenos*) to be mortgaged and to fix the value of the same.

3. Consequently the government is free to dispose of the public lands (*tierras*) for the public benefit.

ESTABLISHES BUREAU OF COLONIZATION.

Legislacion Mexicana, Vol. V, P. 217, No. 2925.
Decree of November 27th, 1846.

ARTICLE 1.- In conformity with the provisions of Article 16 of the Regulations for the execution of the law of June 1st, 1839, a Bureau of Colonization is established under the immediate dependency of the Department of (Foreign) Affairs.

FOR THE BUREAU OF COLONIZATION.

Legislacion Mexicana, Vol. V, P. 229, No. 2931.
Regulations of December 4th, 1846.

Department of Internal and External Affairs.

His Excellency, the General entrusted with the supreme executive power of the United States of Mexico, to the inhabitants of the Republic, know ye:

That, being firm in the desire to make effective the prosperity the system of colonization should produce in the Republic, and considering that the decree issued on the 27th of last month, which established the Bureau of that Department, will not produce the results expected, if its functions are not immediately defined; having before me the report in which these are prescribed as presented by said Bureau, which has been occupied in draughting the same with care and efficiency from the moment it was installed, in compliance with the provisions of article 3 of said decree of the 27th of last month, taking into consideration the initiative the government had decided to

make, which establishes the principal basis upon which will depend the success of colonization, I have seen fit to decree the following regulations:

ACT OF CONSTITUTIONAL REFORMS.

Legislacion Mexicana, Vol. V, P. 275, No. 2982.

Decree of May 18th, 1847.

ARTICLE 11. It is of the exclusive power of the general congress to give bases for colonization, and to enact laws under which the powers of the Union are to discharge their constitutional functions.

ANNULS DECREE OF THE STATE OF SONORA, DECLARING PUBLIC LANDS BELONG TO SONORA AND PROVIDES FOR COLONIZING THE SAME.

Legislacion Mexicana, Vol. VI, P. 76, No. 3565.

Decree of May 14th, 1851.

"The decree of the Legislature of the State of Sonora of May 6th, 1850, is unconstitutional, which says:

"No. 134. The Constitutional Congress of the State of Sonora decrees the follows:

ARTICLE 1. There are colonizable in the State all the desert and vacant lands on its frontiers, which belong to it

and are not the property of an individual, corporation or town.

2. To all foreigners who desire to establish themselves on these lands and who are not disqualified to do so under the general laws, security and protection to their persons and interests are offered.

3. The State grants to every family settling on said lands one *caballeria* of irrigable agricultural land, which is an area of one thousand four hundred *varas* long, by five hundred and fifty-two *varas* wide, and a *sitio* of five thousand *varas* squared of grazing land and, in addition, the necessary land for building houses in town to live in.

4. The settlers on the lands under this law must establish themselves thereon and cultivate the same to enjoy the products thereof, and shall not alienate them until after six years, under penalty of losing them and of their passing to another settler who applies for them.

5. For the term of ten years from the establishment of a colony, the settlers thereof are exempt from every direct or indirect tax now imposed or that the State may impose.

6. The effects, utensils, lumber and whatever may be brought in for use or consumption of said colony are also exempt from all duties for said term.

7. The products of the colony are likewise exempt from all taxation in the State.

8. The gold and silver taken therefrom, from the time of its establishment, are exempt from the assay tax of three per cent.

9. The government is empowered to regulate, in its turn, the government and interior administration in the establishment of colonies that may be made on said lands, to contract for enterprises with this object in view and to

determine the most suitable lands under the purposes and franchises of this law. If, for this purpose, further privileges are solicited, they may be granted at the discretion of the government, subject to the approval of congress.

10. Foreigners established in the colonies shall enjoy all the civil and political rights the laws give them; as also the power they thereby have to acquire every kind of real property.

11. Mexicans and foreigners shall enjoy the same privileges in a colony in Sonora, but in equality of circumstances the Mexican promoter of a colony shall alone be preferred to the foreigner.

12. The colony shall be understood as established as soon as there is gathered together therein, at least, the number of one hundred families in the sense of a town.

13. To the promoter who contracts for the establishment of a colony, under the articles of this law, there may be granted as a property ten *sitios* of grazing land and its *caballerias* of irrigable agricultural land, or ten of *temporal* land.

14. The colonists, in case of necessity, are obligated to contribute with their persons and interests to the defense of the State and of their new country.

Because it is opposed to Article 2 of the Act of Reforms, which says:

"*It is the exclusive right of the general Congress to establish bases for colonization* and to enact laws under which the powers of the Union are to perform their constitutional functions;" and to Article 2 of the general law promulgated April 25, 1835, which says:

"ARTICLE 2. In the exercise of the power reserved to the general Congress in Article 6 of said law of August

18, 1824, the frontier and literal States are prohibited from alienating their vacant lands for colonization, until the regulations to be observed in carrying it out are established."

ANNULS SALES OF LANDS MADE BY STATES, ETC.

Legislacion Mexicana, Vol. VI, p. 776, No. 4118.
Decree of November 25th, 1853.

Antonio Lopez de Santa Anna, etc.

ARTICLE 1. It is declared that the public lands *(terrenos)*, as the exclusive lands of the Nation, never could have been alienated, under any title, by virtue of decrees, orders and enactments of the legislatures, governments or local authorities of the States and Territories of the Republic.

2. Consequently, it is also declared that the sales, sessions or any other class of alienations of said public lands (*terrenos*) that have been made without the express order and approval of the general powers in the manner prescribed by the laws, are null and of no value or effect.

3. The officials, authorities and employes, upon whom devolves the execution of this decree, shall proceed, as soon as they receive it, to recover and take possession in the name of the Nation of the lands comprehended in the provisions of article 1, and that may be in the possession of corporations or private individuals, whatever may be their prerogatives or position.

4. The judicial, civil or administrative authorities shall admit no claims of any kind, nor petitions whose purpose is to obtain indemnification from the public treasury for the damages the unlawful holders or owners may allege, under the provisions of the preceding article; and they shall preserve their right only against the persons from whom they have the lands (*terrenos*) they are now compelled to return.

ANNULS SALES OF LANDS MADE BY STATES, DEPARTMENTS, ETC.

Legislacion Mexicana, Vol. VII., P. 228, No. 4276. Decree of July 7, 1854,

Antonio Lopez de Santa Anna, etc.

ARTICLE 1. The titles of all the alienations of public lands (*terrenos*) made in the territory of the Republic from September, 1821, till date, whether by the general authorities or by those of the extinguished States and Departments, shall be submitted to the revision of the supreme government, without which they shall have no value and shall constitute no right of property.

2. To this end the Ministry of Public Works shall appoint commissioners, who may be the agents it now has in all the Departments and Territories, to whom the proprietors of public lands, or those who represent them, shall be obligated to present the titles of the acquisition thereof within the term of six months, counted from the date on which this law may be published in each capital. There shall be admitted, for the purpose of the present decree, not only the original documents, but also, in

default thereof, copies thereof, authenticated and conformable to the law, and besides compared by the commission that may receive them. Proprietors who do not comply with the obligations which are imposed upon them by this and the preceding article shall be considered as detainers without any title.

* * * * * *

5. The alienations of public lands (*terrenos*), of whatever nature they may be, that have been made by the authorities and officials of the departments without the knowledge and approval of the general government, during the epoch when the central system was in force in the Republic, are void.

* * * * * *

8. The alienations made by the States or departments and declared void by the three preceding articles may, nevertheless, subsist if the holders of the lands (*terrenos*) obtain the consent of the supreme government, and pay into the public treasury what it considers proper to act as the value of the land (*terrenos*); *provided*, they apply for this ratification within the term designated in Article 2, in which case alone there shall be no further proceedings to annoy or jeopardize them.

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REPEALS SANTA ANNA DECREES.

Legislacion Mexicana, Vol. VII, P. 627, No. 4588. Decree of December 3rd, 1855.

Juan Alvares, President ad interim, etc.

ARTICLE 1. The decrees of November 25th, 1853, and July 7th, 1854, which submitted to the revision and

approval of the supreme government the grants or alienations of public lands (*terrenos*) made by the local governments of the States or Departments and Territories of the Republic from September, 1821, to that date, are repealed in all their parts.

2. Consequently, all the titles issued during that period by the superior authorities of the States of Territories under the Federal system by virtne of their lawful faculties, or by those of the Departments or Territories under the central system, with the express authorization or consent of the supreme government for the acquisition of said lands (*terrenos*), all in conformity with the existing laws for the grant or alienation respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government.

3. The alienations of public lands (*terrenos*) that have been made by the authorities of the States or Departments and Territories without the requisites referred to in the preceding article, and in contravention of the provisions of article 4, of the law enacted by the general congress on the 18th of August, 1824, are void and of no value, and the holders of that class of lands (*terrenos*) are subject to the penalties estalished by the existing laws in the Republic for those who acquire property in an unlawful and fraudulent manner, unless they promptly obtain the approval of the supreme government, to which they should apply therefor through the Department of Public Works.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 429.

SANTIAGO AINSA, Adm'r, Etc., *et al*, *Appellants*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF AND ARGUMENT OF APPELLANTS IN REPLY.

Rochester Ford,
Attorney for Appellants.

Supreme Court of the United States.

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APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF AND ARGUMENT OF APPELLANTS IN REPLY.

The brief for appellee raises a number of points which were not discussed in the opinion of the lower court. We believe that every one of the reasons urged against this grant can be shown to be without merit, and we shall endeavor to show this by considering each objection made.

Taking up the objections *seriatim* as they appear in appellee's brief, we find the statement on page 3 that "by the order of his appointment" the commissioner who was to make the survey "was required to comply with the provisions of the laws of Sonora dated May 20, 1825, and July 11, 1834, and the order nowhere refers to any national laws."

The answer to this and to the subsequent statements of appellee that "publication was ordered in accordance with the state law" and that "the matter was referred to the attorney general of the treasury department, as required by the state law," is found in article 10 of the

law of April 17, 1837, which continued in force the laws, regulations and instructions of each state. (See this law, page 53 of appellants' main brief.) The officers proceeded under what had been the laws of the state but which had become federal laws by being continued in force.

The statement on page 5 of brief for appellee that the land was sold by a board of sales, composed of departmental officers and constituted "as provided by the laws of the State of Sonora," is we submit, directly contrary to the fact. This board was constituted according to the decree of the supreme government of April 17, 1837. The further statement of counsel for appellee, page 6 of their brief, that "none of the proceedings are or purport to be in compliance with any federal law, nor did any federal officer participate in the proceedings," is, we submit, also opposed to the facts as shown by the title-paper. Each officer was a federal officer, created by the federal laws, from the superior chief of the treasury of the department, with whom the proceedings begin, to the departmental treasurer, who succeeded under the federal law of December 16, 1841, to the functions of the superior chief of the treasury, and who terminated the proceedings by issuing the final title. Throughout the proceedings the officers refer to the federal laws under which they acted, and these laws are found in the official edition of the legislation of Mexico just as cited.

The statement on page 7 of appellee's brief that "commencing at the north cross monument of the ranch of La Casita and measuring north along the Tubac road 340 cords of 50 varas each, the measurement would terminate 3.54 cords (about 411 feet) south of the line between Mexico and the United States," fails to call attention to the fact, as set out in the affidavit of Ygnacio Bonillas (rec., p. 132, 133), that this Tubac road is not a straight road but a meandering one. It was shown that 340 cords meas-

ured north from the north cross monument of the Casita ranch on a north and south line would reach 3,005.88 feet into American territory. The lower court so states in its opinion (rec., p. 140): "It appears from the evidence that a parallelogram 340 cordels and 222 cordels in width, measured from the point designated by the commissioner as the essential point of the survey, would be partly within the Territory of Arizona and partly within the State of Sonora."

The statement of appellee (page 8 of brief) that the testimony on behalf of the government tended to show "that none of the monuments referred to in the titulo are now in existence," is in opposition to the record. This is discussed in full on pages 15–18 of our main brief. The further statement (p. 44) "that none of the original monuments are now in existence, and it is shown that they were not in existence in 1882," is also opposed to the facts appearing in the record. The 1882 survey shows that the southeast and southwest corner monuments of the Nogales grant were found and its southern boundary identified (rec., p. 105); that the surveying party in 1882 "proceeded to the north cardinal monument of the ranch of Nogales called for in the titles on the road that goes to Tubac, where a wide valley opens out, and to-day they call it the valley of Juan Antonio," and that at the northeast corner "there was found the ancient monument, which was renewed." The northwest corner monument was clearly identified by Oury.

In spite of the fact that the record is so full as to the original survey in 1841, appellee suggests that "it is fairly to be inferred from the record that the tract was never surveyed at all, and that the surveyor was never upon the grant," but this Court has expressly decided that recitals in a grant cannot be taken as false on mere inferences. Considering the recitals in the grant passed on in Hornsby *vs.* the U. S., 10 Wall. 224, this Court said at page 238:

"The grant in this case recites that the necessary steps had been taken, and something more than mere surmises at this day is necessary to show that the recital is false."

Under the first head of their argument, counsel for appellee cite (page 25 of their brief) in support of the claim that this grant was made without authority, article 3 of the law of January 17, 1837, adjudicating to the national bank all the real property of the nation for a redemption fund, and cite, also, article 2 of the decree of April 17, 1837, by which the revenues, taxes and property which by this law of January 17, 1837, were assigned to the national bank, were excepted from the revenues granted to the departments until the law of January 17 fulfilled its object. As to this law creating the national bank, it is enough to say that only the proceeds of sales of lands were adjudicated to it, and that even if the very land sold in this Nogales grant had been adjudicated, the bank is the only one that could make any objection to this grant. It would not lie in the mouth of the Mexican Government or of the United States to claim, after selling this land and receiving payment therefor in full, that it had no authority to sell. But a short and, as we think, a satisfactory answer to any objection based on the creation of this national bank is found in the fact that before this Nogales grant was made the functions of the bank and of all its officials were repealed by the decree of December 6, 1841, which is to be found in the Nueva Coleccion Leyes y Decretos Mexicano, vol. 2, p. 25. The law of January 17, 1837, had thus fulfilled its object before this grant was made, and at the date of the grant the bank was as though it had never existed.

Article 7 of the law of April 12, 1837, creating the national consolidated fund, is cited also (p. 25). The utmost effect that this law could have would be to operate as a mortgage upon the lands claimed under this grant, if

such lands were embraced within the mortgage, but there is nothing to warrant the assumption that the lands in this grant were ever designated as coming under the mortgage. But if they had, and the mortgagor, the Mexican government, afterwards sold such lands, as it did in this grant, there is nothing in this to defeat the title of the purchaser as against Mexico. The purchasers would take subject to the mortgage. Such a sale might be an act of bad faith toward the bondholders, but they alone could complain. But apart from these considerations, this decree can be disposed of by reference to the historical fact that the public creditors did not accept the inscriptions of the public lands contemplated by the decree, so nothing came of it.

The same idea, however, was embraced in the 7th article of the convention of September 15, 1837, with the foreign bondholders, in which, in addition to the proposed mortgage of one hundred million acres of the public lands, it was proposed that twenty-five million acres of lands in the departments of closest communication with the Atlantic should be set aside for the deferred bonds, and that if the government sold such lands the proceeds therefrom should be devoted to the redemption of said bonds.

As to this provision it seems clear that even if the lands embraced within the Nogales grant had been included within this mortgage, this fact would not affect the title, as against the Mexican government, of a purchaser of such lands. The purchaser would take subject to the mortgage, and the only one who could complain would be the mortgagee. The bondholders might claim that the lands were sold too low, or that the proceeds had been misapplied, but surely the Mexican government could not sell these lands and receive full payment therefor, and then claim that it had no right to sell them. It could, in any event, sell whatever interest it had

in the lands, and the title of the purchaser would be good as against Mexico or the United States.

But this provision contemplating a mortgage is immaterial for the further reason that there is absolutely nothing to warrant the assumption that the particular lands in this Nogales grant came under the mortgage. The Mexican government did not undertake to mortgage all its lands in the departments, and there is nothing to show what lands were designated as coming under the mortgage and what lands remained unaffected. The fact that the officials sold the land embraced within this Nogales grant is enough to show that such lands were not covered by the mortgage, and that there was no other reason why they should not be sold. The fact is that the convention with the bondholders of September 15, 1837, was not approved till June 1, 1839 (see law of that date, page 12 of appellee's brief), and the bureau of colonization proposed to be created by this law of June 1 for the survey of the lands and the designation thereof was not, in fact, established until several years later by decree of November 27, 1846, and the regulations of December 4, 1846 (page 15 of appellee's brief). This was years after the lands embraced in the Nogales grant were sold.

Appellee asks on page 30 of brief: "Was it lawful for the Mexican nation, even had it attempted to do so, to authorize the officers of the departments to sell the public lands, which had been solemly adjudicated and mortgaged, at a price less than one per centum of that which it had solemly promised should be charged for the lands if sold?" The answer to this is that there is nothing to show that the lands in question were ever subject to any mortgage, and, if they were, the legality of their sale could not be raised by the Mexican government. The bondholders would be the only ones who could object.

It will be noted that although Santa Anna attempted to declare certain grants null, neither he nor any other

Mexican official ever suggested, so far as it appears, that lands could not be sold because of the agreement with the bondholders. As to the price at which the lands were sold in this grant, it will be seen that such lands have not risen much in value, for 1886 the surplus of 4,631 hectares, or 11,418 acres, was sold sold for $555.74, or about five cents an acre.

The statement appearing on page 29 and at other places in appellee's brief that "the laws of Sonora had been expressly repealed," we have endeavored to show is erroneous, because, far from being expressly repealed, they were expressly continued in force by article 10 of the law of April 17, 1837, heretofore cited. This law was subsequent to the law of April 4, 1837, and of the general law of April 25, 1835, which laws, appellee thinks, "wiped out the last vestige of any authority to make sales or grants of public lands, for any purpose, by virtue of any law passed by the former states." We again refer, because it seems a satisfactory answer to this and other similar assertions, to the fact that the Mexican attorney general reported (title-paper, p. 13) that a certain law of the old state was still in force, thus showing that the laws of the old states were not "wiped out." But for other reasons it seems clear, under the decisions of this Court, that the two laws last cited were not intended to have, and did not in fact have, the effect which counsel ascribe to them. The law of April 25, 1835, prohibiting the border or litoral states from alienating their lands for colonization, and the laws of April 4, 1837, repealed the laws on colonization, so far as they were in conflict with that law. But this grant was not made under any colonization law. It was made under laws providing for the sale of lands to Mexican citizens. In Arguello *vs.* U. S., 18 How. 539, this Court fully considered the decree of 1824 and the regulations of 1828, and held that "the term 'colonization' implies immigration in numbers, and that the first eight

sections of the law of August 18, 1824, apply wholly to colonists and foreigners," and the Court said further that "while a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and sea-coast, we cannot impute to them (the supreme government of Mexico) the weakness or folly of confining their native citizens to the interior, and thus leaving their sea-coast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners would encourage the settlement of natives within those bounds. The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers."

It would be, we submit, contrary to the policy and all the legislation of Mexico to hold, as counsel for appellee urge, that there were no laws in 1843 under which Mexico could sell lands to her own citizens. This would indeed be imputing to her "weakness and folly." The laws for sales of lands to Mexicans remained in force, unaffected by the changes in the colonization laws produced by the laws of 1835 and 1837 cited by appellee.

The assertion of counsel for appellee, page 28 of their brief, that from April 4, 1837, "no power can be shown in any departmental officer to make sales or grants under any law," seems, it is respectfully submitted, contrary to principles which this Court has said are fundamental and elementary. In U. S. *vs.* Arrdeondo, 6 Pet. 691, 727, quoted with approval in Sabariego *vs.* Maverick, 124 U. S. 261, 281, this Court said: "This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officers or tribunals who exercise it by making grants, and that it is fully evidenced by occupation, enjoyment and transfer of property, had and made under them, without any disturbance by any

superior power, and respected by all coördinate and inferior officers and tribunals throughout the State, colony or province where it lies."

Possession of this grant was given, as is shown by the grant itself, and this possession was never disturbed by the Mexican government. The grant was recorded in the book of Toma de Razon, was the subject of transfers, and was respected by the authorities and everyone else. This must be presumed, as there is nothing in the record to show that the possession of the grantees was ever called in question in any way. It certainly seems that the presumption of legality and authority announced in the Arredondo case applies to this grant.

The Supreme Court of Texas in The Heirs of Holliman *vs.* Peebles, 1 Tex. 699, said that "The presumption of law that the public act of the public officer, purporting to be exercised in an official capacity and by public authority, shall be presumed to be the exercise of a legitimate and not an usurped authority, is recognized in its full force," and the same court said in Hancock *vs.* McKinney, 7 Tex. 384, at page 442: "The construction of their powers and of the laws which conferred them, adopted and acted upon by the authorities under the former governments of the country, must be respected until it be shown that they have clearly transcended their powers, or have acted manifestly in contravention of law. The presumption must be that they rightly possessed and exercised those powers which they were accustomed to exercise, until the contrary be shown." It would not be reasonable to suppose that the high officials who acted in the execution of this grant did not have "as enlightened views in respect to the true policy of the government and as just an appreciation of their powers and duties as we possess in respect to them." (Hancock *vs.* McKinney, *supra.*) "The general rule is that when the acts of the officers of a foreign government are brought in question

in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears." (Mott *vs.* Reyes, 45 Cal. 379, 385.)

Under the Spanish and Mexican governments the judiciary had no authority to interfere at all in any case. The political power retained to itself all the power to reform or annul titles. (White *vs.* Burnley, 20 How. 235.) The construction, therefore, which the Mexican officials put on the laws and their authority by making this grant, raises a strong if not a conclusive presumption that they were authorized to act as they did. (Arguello *vs.* U. S., 18 How. 539, 549.)

Decree of Santa Anna.

Appellee cites and lays stress on the decree of Santa Anna of November 25, 1853, as nullifying this grant. What effect, if any, this decree may have on grants embraced within its provisions is an important question, and is before this Court in other cases, where it is properly raised. Grants of land were habitually made by the authorities of Sonora, while it was a state, and titles issued in the name of the state. One of such grants is before this Court in the case of Camou, appellant, *vs.* The United States, No. 834, October term, 1894, involving the San Rafael del Valle grant, appealed from the Court of Private Land Claims. The effect of this Santa Anna decree will necessarily have to be discussed in that case, but it seems sufficient in the present case to call the attention of the Court to two points only. The first is that the decree in terms refers only to alienations "by virtue of decrees, orders and enactments of the legislatures, governments, or local authorities of the States and Territories of the republic." This decree was modified, as to grants made by the States, by Santa Anna's later decree of July 7,

1854, in which he declared also void all alienations of public lands "that had been made by the authorities and officials of the departments without the knowledge and approval of the general government during the epoch when the central system was in force in the republic." The same decree provided, however, that the alienations made by the states or departments and declared void might nevertheless subsist if ratification by the supreme government were applied for. Each of these decrees of Santa Anna was repealed in all its parts by the decree of President Alvares of December 3, 1855.

It is seen from these decrees that the one of November 25, 1853, refers exclusively to grants made by the states, and that grants made by the departments were not referred to till the decree of July 7.

This grant, therefore, is not affected by the decree of November 25 because it is not a state grant, and is not affected by the decree of July 7 because that decree was made after the Gadsden treaty.

Counsel for appellee cite this decree of July 7 as a "declaratory law, declaring what the law was and always had been," although, as just shown, this declaratory law was itself repealed and pronounced erroneous. Under section 7 of the decree of December 3, 1855, all titles issued by the states or departments are declared good except such as were issued in contravention of laws existing at the date of the grants. Under this last decree, if the grant was valid when made it remained valid, and even those declared void in their inception might be ratified if the approval of the supreme goverment were obtained.

The decrees made after the treaty we conceive to be wholly immaterial. If the grant in question was good at the time the land passed under the jurisdiction of the United States, no subsequent legislation of Mexico could invalidate it.

Counsel for appellee say on page 30 of their brief that the Secretary of the Department of Public Works of Mexico gave his opinion in 1886 that this Nogales title was of "manifest nullity." This opinion, it will be observed, was given a generation after the land had passed under the jurisdiction of the United States, and is based on the statement that the grant did not conform to the law of December 3, 1855 (rec. p. 119). But this law itself was passed after the treaty, and, of course, cannot affect land which was then in the United States. Neither this Mexican Secretary of Public Works nor any other Mexican official or tribunal has ever suggested that this grant is opposed to the provisions of any law in force at the time of the treaty, and the laws in force at that time are the only ones which determine the validity or invalidity of this grant.

The second point to be observed as to the Santa Anna decree of November 25, 1853, is that it did not attempt to declare void all state grants. It is not so flagrantly unjust as that. It is limited to alienations made "without the express order and approval of the general powers in the manner prescribed by the laws." Nor does the decree of July 7, 1854, attempt to declare void all department grants. It is limited to those made by the authorities and officials of the department "without the knowledge and approval of the general government" during the epoch when the central system was in force. The title-paper of this Nogales grant shows that it was made with both the knowledge and approval of the general government, for the proceedings were instituted by the chief federal officer of the department, namely, the superior chief of the treasury, acting under the "supreme order of December 21, 1840," and the proceedings were carried out by the proper federal officers acting under the laws of the supreme government. It is shown by the title-paper that in accordance with article 76 of the laws of April 17, 1837, a certified copy of the proceedings of the junta in regard to the

sale of this land had been furnished the superior chief of the treasury. Under this article it was the duty of that official "to make report thereon to the supreme government whenever necessary." It must be presumed that he did his duty, and that he made a report if he thought it necessary, and there is not a word in this record to indicate that any objection was ever made to this grant by the supreme government. Under these facts, the approval of the grant by the supreme government must be presumed. (Gonzales *vs.* Ross, 120 U. S., *supra*, 605, 619.)

The Recording of This Grant.

We have set out the evidence on this point in our brief in chief. Counsel for appellee state, page 40 of their brief, that it does not appear how the certificate of the treasurer general of Sonora as to the entry of this grant in the book of Toma de Razon came into the transcript, but they evidently overlook the stipulation on page 141 of the record that this certificate was offered in evidence at the trial of the cause on the part of defendants. The supposed error as to the paging of this entry is, as we have shown in our main brief, either a typographical or clerical one, as the original entry gives the correct page, 64, and the error appears only in the translation.

Was This a Grant of a Specific Quantity of Land?

Under this head counsel for appellee cite the case of the U. S. *vs.* McLaughlin, 127 U. S. 428, as in point. But a reference to this case shows (page 434) that in the petition which the grantee filed asking for the confirmation of the grant he admitted that only "eleven square leagues were granted to him within the boundaries as described by the grant made by the Mexican governor of California." Confessedly this was a grant by quantity, or

a floating grant. No survey was ever made or delivery of judicial possession had.

The case of Hornsby *vs.* The United States, 10 Wall., 232, is also cited as seeming to be "authority directly in point in favor of the construction of this (Nogales) grant as a grant by quantity."

But it will be seen that in the Hornsby case also there had been no survey or delivery of juridical possession.

In this Nogales case the land had been identified by the survey, and juridical possession was delivered to the grantees according to the "land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey." The grant itself states that it was by the "metes and bounds" of the survey. And in spite of this language counsel for appellee claim that it was not by metes and bounds.

The grantees were cautioned to "maintain at their boundary termini monuments of stone and mortar." But appellee urges that this grant was a float, and the boundaries never located. How, then, could the grantees maintain monuments at their boundaries?

Counsel for appellee ask as to juridical possession "by what officer was it delivered, on what day, who were present," etc. These questions are answered by the title-paper. The juridical possession of "said 7½ sitios and two short caballerias of land, comprising the vacant public lands between the boundaries of Casita and those of Tumacacori and Calabazas," was, on April 7, 1843, the date of the grant, delivered by Ignacio Lopez, the treasurer general of the department of Sonora, in the presence of the two witnesses Antonio Teran y Peralta and Joaquin Urias, to the grantees, in pursuance of the survey made November, 24, 1841, and following days, in the presence of Marcelo Bonilla, the coterminous owner, by which survey the land was segregated from the public domain.

Counsel for appellee cite a portion of the opinion of the surveyor general on this grant. This Court held in Pinkerton *vs.* Ledoux, 129 U. S. 346, 351–352, that the report of this officer is no evidence of title or right of possession, and that his duties consisted merely in making inquiries and reporting to Congress. We understand this to be the law; but if his report is to be considered it will be seen that he states (rec., p. 28) that "the validity of this claim is beyond a question;" that "there is ample archive and record evidence of the genuineness of this grant;" that "it is properly recorded in the proper book in the Mexican State of Sonora." He shows (rec., p. 25, 26) that under the departments the method of disposing of the public lands remained substantially the same as before. He gives on the same pages of the record a list of the laws empowering the officials who made this grant to act as they did, showing that they were federal officials, acting under federal laws. Nothing was further from the mind of the surveyor general than that this was a floating grant, for he shows that the petitioners asked for "certain vacant lands between the limits of two well-known grants," and recommends that this grant should bound said ranches on the north and south.

This Court in the earliest case in which a grant of quantity came before it (Fremont's case, 17 How. 542) pointed out the difference between surveyed grants and floating grants. At page 554 it is shown that when a grantee "had incurred the expense and trouble of the survey under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant," and this language was cited and approved in McMicken *vs.* U. S., 97 U. S. 204, 215. This principle applies to the present grant. The survey and the fees of surveying, auditing and assessing officials were paid by the grantees, and this could be only because

the grantees were buying the land which was surveyed. Under article 63 of the law of July 11, 1834, they were to place "upon the boundary lines of their estates landmarks of stones as soon as they are in possession of their estates." This is so inconsistent with the idea that their estates consisted of an undesignated, unlocated, floating quantity of land that nothing further need be said as to it.

This Court has considered so many grants both of quantity and by metes and bounds that controlling precedents are not wanting. In Hornsby *vs.* U. S. 10 Wall. 224, 234, the Court said: "Under Mexico the measurement and segregation from the public domain of the quantity specified in this class of grants (grants by quantity) could only be made by officers of the government. A measurement by the grantees was inoperative for any purpose."

It is thus clear beyond dispute that the grantees in this Nogales grant were not to measure off any quantity, and it is just as clear that the officers of the government did not intend to do so, for there is no direction that any officer should. Such a proviso was inserted in grants of quantity without any exception. Many grants of this kind have passed under the consideration of the Court, beginning with the one in Fremont's case, and it will be found that in every one the condition was present that the "grantee shall solicit the proper judge to give him juridical possession by virtue of this decree, and he shall mark the boundaries with the proper landmarks." Such grants provided, further, that "the magistrate who gives possession shall cause it to be measured according to law, leaving the surplus which may result to the nation for its necessary uses."

There is not a word in this Nogales grant about any subsequent measurement or delivery of possession. The land had been measured and possession given, and neither

the grantees nor the government contemplated anything further.

The grant passed on in Malarin *vs.* U. S., 1 Wall. 282, was a grant by quantity, in which the quantity granted was subsequently measured and the possession thereof juridically delivered. The proceedings of the appointment of officials for the measurement, the citation of adjacent proprietors, and the details of the survey are the same in every essential legal respect as in this Nogales grant. That the proceedings in the Nogales title-paper show a juridical delivery of possession of the whole tract embraced in the survey seems to be as clear under the decisions of this Court as any fact could be.

On the other hand, in U. S. *vs.* Watkins, 97 U. S. 219, this Court said: "This case is based upon a complete and perfect title, bearing date the 5th of March, 1804. This title consists of a Spanish grant, made by the Intendant Morales to one Charles Ramos, for 20,000 arpents of land, situated in the St. Helena portion of Baton Rouge district, on the Amite River, and described by metes and bounds, according to a survey thereof which had been previously regularly made. The grant was made in pursuance of a sale of the land." The undersigned has procured a copy of this grant and has carefully examined it. It shows that two tracts of land were surveyed and appraised, the metes and bounds being marked by the survey, the money paid, the party put in possession, and final title issued "agreeably to the boundaries designated, the localities, courses and distances." It is respectfully submitted that the grant does not differ in any legal respect from this Nogales grant, and that it is a precedent, settling the point that this Nogales grant is also "a complete and perfect title of the tract described by the metes and bounds of the survey which had been previously regularly made." The language in each grant conveys a

complete and perfect title, and in each the tract of land had been surveyed and its boundaries identified.

Counsel assert (page 45) that "certainly nothing can be plainer than that these appraisers intended to appraise only 7½ sitios. Nothing can be plainer than that they did appraise only 7½ sitios." But the repeated statements of the record show that it was the whole tract which was appraised. The title-paper recites that the commissioner was ordered to proceed to the "survey, appraisement and publication of the vacant public lands;" that "having completed the survey of the vacant public lands," he ordered that "the appointment of practical persons to appraise the land be proceeded with;" that "the sitios surveyed" were appraised; that "the vacant public lands between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, comprising 7½ sitios and surveyed, are appraised;" and, as if to remove all doubt, it is stated that the "said public lands" were published, after having been surveyed and appraised, and that the sale was to be of "said public lands." If counsel mean that a part only of the tract was appraised, they come in conflict with the plain English of the title-paper.

Counsel for appellee say on page 43 of their brief: "We know of no fact, either in evidence or history, which should lead this Court to believe that grants in Sonora were an exception" to the rule that Mexican grants were grants by quantity. As opposed to this we have to say that in his work on the Public Land System of the United States, by George W. Spaulding, of the Sacramento bar, Bancroft & Co., 1884, in classifying the Mexican grants in the United States, he gives as the second class, page 265 of his work:

"In the Treaty of Guadalupe Hidalgo; in the Gadsden Treaty; Grants in Arizona and New Mexico. 2. Grants (so-called) where the land, after certain prelimin-

ary proceedings, was put up at auction and sold to the highest bidder. In other words, they are executed contracts of purchase instead of voluntary grants. They are confined to the land acquired under the Gadsden treaty, and are located principally in New Mexico and Arizona."

The author distinguishes between these executed contracts of purchase, or the Sonora grants, and the incomplete grants by quantity, made by the governors of California. It seems to be common knowledge among those members of the legal profession who have investigated the subject that the Sonora grants were not grants by quantity. They were in each instance preceded by a survey, and the land was sold according to such survey; whereas the grants by quantity were not surveyed when they were issued. If they were afterwards surveyed and juridical possession given, they ceased to be grants by quantity, and became grants of a specific tract. (Graham *vs.* U. S., 4 Wall. 259.)

As to the statement of appellee, page 55 of brief, that the cession of part of the land covered by this Nogales grant to the United States is "equivalent to saying that the quantity due the original grantee is not to be located there," we refer the Court to what is said on pages 59, 69 of our main brief. Appellee mistakes the intention and effect of the Mexican proceedings of 1882. They are based on the clearly expressed theory that all the land within the monuments of the grant had passed to the grantees, and that they could retain it all by paying for the excess. The difference between a grant of an entire tract, located by metes and bounds, with the liability on the part of the grantees, under the Mexican law, to pay for an excess, and an unlocated grant by quantity, where the grantee had no rights at all as to the surplus, is too plain to be misapprehended by this Court.

Was the whole tract as surveyed sold, or only a part sold and the rest reserved? The title-paper contains an

answer to this which we submit is too plain to admit of cavil. We think if the plain meaning of the English language is to be taken, it is incontrovertible that the whole tract was sold. This must be true because the title-paper in the third public offer and sale, in the granting clause of the grant, in the receipt for payment, in the schedule of costs and in the entry in the book of Toma de Razon contains the statement that the "7½ sitios comprising the vacant public lands situated between the boundaries of Casita and those of Tumacacori and Calabazas" were sold. But a part of the tract could not comprise the whole. 7½ sitios, not located within the boundaries, could not comprise or include the vacant public lands. The definition of the verb "comprise" is given in the Century dictionary as "to comprehend; contain; include; embrace; as, the German empire comprises a number of separate states." That which comprises something must be equal in extent to that which is comprised. Therefore the 7½ sitios comprising the vacant public lands must be the same in extent as the public lands comprised. Appellee argues that the 7½ sitios were only an unlocated part of the vacant public lands, but this is attempting to argue that a part comprises or is equal to the whole. The 7½ sitios comprising the vacant public lands can mean nothing else than the 7½ sitios being the vacant public lands.

Respectfully submitted,

ROCHESTER FORD,

Attorney for Appellants.

Office Supreme Court, U. S.
FILED
OCT 25 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SANTIAGO AINSA ET AL., APPELLANTS,
v.
THE UNITED STATES, APPELLEE.
No. 429.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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Since the preparation of the original brief for the United States, appellants have served upon counsel two additional briefs in which new claims are made as to the authority for making the grant relied upon, in which new questions both of law and fact are discussed, which new claims and questions seem to justify a further statement of the position of the Government.

A short epitome of the history of Mexico, in respect of its public land laws, may not be out of place as premise to the further discussion of these questions.

The independence of Mexico is shown by history to have been effective as of the date of the proclamation of the "*Plan de Iguala*," namely, February 24, 1821. This act or declaration of independence was consummated

by the capture of the City of Mexico by Iturbide on September 27, 1821. On February 24, 1822, an independent congress assembled at the City of Mexico, pursuant to the Plan de Iguala and that outlined by the treaty of Cordoba, and thereafter Iturbide was elected Emperor, and was crowned on July 21, 1822.

On April 7, 1823, his Government was overthrown and all its acts declared void, and on June 17, 1823, an election law was passed by Congress as contemplated by the original plan. January 31, 1824, a "constitutive act" was adopted, under which the "general constituent congress" was elected. This Congress, on August 4, 1824, passed a law for the classification of revenues, which is the first law referred to in the title paper introduced in evidence, and which is set forth at length in the appendix to the original brief for the Government (p. 1).

The substance of this law, in so far as it applies to the facts of this case, provides that certain taxes and revenues, including the import and export duties, revenue from tobacco and powder, excise tax paid on tobacco, the revenue from postal service, from lotteries, from salt works, and from the territories of the federation, were declared to belong to the general revenues of the federation; and the revenues not included in this classification were declared to belong to the States.

On August 18, 1824, the same Congress passed a law, known as the colonization law, sections 2, 3, 9, and 16 of which are as follows:

> 2. The object of this law is those lands of the nation which, not being private property nor belonging to any corporation or town, can be colonized.

3. For this purpose the congresses of the States shall enact, as soon as possible, laws or regulations for the colonization of their respective demarcations in strict conformity with the constitutive act, the general constitution, and the rules established in this law.

* * * * *

9. In the distribution of lands preference shall be given to Mexican citizens, and no distinction shall be made between them, except that only to which their individual merits and services to the country entitle them, or in equality of circumstances, residence in the place to which belong the lands to be distributed.

* * * * *

16. The Government, under the principles established in this law, shall proceed to the colonization of the territories of the Republic.

On November 21, 1828, the Executive promulgated certain regulations for the colonization of public lands in the territories, which, as they apply to lands in the territories only, are not important to be considered in this case.

On May 20, 1825, the State of Sonora and Sinaloa (afterwards Sonora) passed a law providing for the sale of vacant public lands in that State by the treasurer, which was reenacted with some changes by the decree of the congress of the State of Sonora, on July 11, 1834. (These laws are both set out in appendix of appellant's brief, pp. 65 to 73.)

These laws do not recite, nor does it anywhere appear, by virtue of what authority the State of Sonora assumed to provide for the sale of the public domain of the Mexi-

can nation unless we assume that it was claimed under article 3 of the colonization law of August 18, 1824, quoted above.

On January 26, 1831, a new national law was passed creating a general department of revenues and providing for the making of regulations for its government, articles 1 and 22 of which are as follows:

> ARTICLE 1. A general department of revenues is established, under whose control shall be all branches of the treasury which are administered for the federation, except the general administration of the mail and that of the mint.
>
> * * * * *
>
> 22. This decree shall not go into effect until those that regulate the general treasury and the commissaries are promulgated.

On May 21, 1831, a law was passed creating the office of commissary-general.

On July 20, 1831, the regulations were passed which had been provided for by article 22 of the law of January 26 next preceding, articles 126, 127, 128, 129, 130, 131, 132, 133 of which are as follows:

> 126. All purchases, sales, and contracts made on account of the treasury, whatever be their purpose, shall be made by the commissaries-general sitting as boards of sale; but before convoking them it shall be absolutely necessary to receive first the order therefor, either from the supreme Government, communicated directly or through the treasury-general, or rather from the directory of revenues, when it relates to matters subject thereto.
>
> 127. Said board shall hold its sessions in the room most suitable for the purpose in the commis-

sariats, or in the public place nearest to those offices, and the regular members shall be the commissary or subcommissary, who shall preside, the senior officer of the treasury, or the one who acts in his stead, and the attorney-general, where there is one, and each of these employees shall take the place or seat to which he is entitled in the order in which they are named.

128. Besides the regular members, there shall be special members, depending on the sale, purchase, or contract being made, for, when it relates to the offices or revenues in the federal district which are subject to the director general, the auditor in charge thereof shall attend, and if subject to any of the other departments, the chief clerk of the bureau of accounts and records of the department of the treasury. If it relates to supplies for army service, the officer appointed by the proper inspector shall be present; if to business pertaining to the artillery arsenals or factories connected therewith, the chief officer thereof; if to hospitals, the first assistant of the medical corps; if to fortification works, the chief of the corps of engineers; and if, finally, to other matters, the employee of the nearest related department appointed by the commissary-general, who shall give timely notice to the regular and special members of the day and hour of the sale, which ordinarily shall be at 10 o'clock in the morning.

When military officers, auditors of the director-general, and the chief clerk of the bureau of accounts and records attend as members they shall take seats in the board next after the commissary-general.

129. In the other commissariats or subcommissariats the chief officer of that department of the revenue in question, if he has his residence there, shall be a special member of the board of sale in

matters relating to the revenues; so also the persons referred to in the preceding article in their respective cases or their chief clerks. In contracts relating to the army the commissaries or subcommissaries shall give notice to the general or subordinate commanding officers to appoint the chief officer or subaltern who is to be present.

130. If there is a notary public in the place, he shall necessarily be present at the sessions of said board, and whatever is done therein shall be certified to by him or by two attending witnesses, in case there is none.

131. That there may be occasion for holding said sessions, the sales or purchases intended to be made shall be published for at least eight days beforehand by placards, which shall be put up in the most public and frequented places, and they shall be inserted in the newspapers of greatest circulation, if there be any in the place, the commissaries being careful that such notices contain the necessary information about the matter and its most essential circumstances.

132. When the sale is opened, and the customary proclamations have been made, all lawfully made bids shall be received until the day of final sale, which shall be made to the bidder who offers the most advantages to the treasury, as determined by an absolute majority of the votes of the board, which minute and everything that may have occurred at the sale shall be entered on the book, which the commissaries and subcommissaries shall keep for the purpose, and which the members shall sign with attending witnesses or with the notary, who, besides, shall draw up all other necessary papers. In the absence of the notary, a clerk, whom the commissary-general shall bring for the purpose, shall draw up the minutes and the conclusions.

133. After the legal term has expired, the commissaries and subcommissaries shall forward the proceedings with their report thereon to the supreme Government, *without whose approval the purchase, sale, or contract shall not be carried into effect.*

On March 14, 1835, the legislature of Coahuila and Texas passed a law, hereinafter copied in full, claiming the power to dispose of 400 sitios of the vacant public lands in that State, and on April 25, 1835, a national law was passed declaring this law null and void, which law was as follows:

Nullifies a decree of the legislature of Coahuila and Texas.

[Comp. laws, Vol. III, page 42, No. 1552, laws of April 25, 1835.]

ARTICLE 1. The decree of the legislature of Coahuila and Texas of March 14 of the present year is, in its articles 1 and 2, contrary to the law of August 18, 1824, consequently the alienations made by virtue of said decree are null and of no value.

2. In the exercise of the powers the General Government reserved to itself in article 7 of said law of August 18, 1824, the border and littoral States are prohibited from alienating their public lands for colonization thereon until the rules they shall observe in doing so are established.

3. If any of them desire to alienate any part of their public lands, they shall not have power to do so without the approval of the General Government, which, in every case, shall be preferred if it sees fit to take them, and shall give the States the proper indemnity.

4. The General Government can, under articles 3 and 4 of the law of April 6, 1830, by virtue of its

preference right, purchase of the State of Coahuila and Texas the 400 *sitios* it says it is under the necessity of selling.

The decree cited in article 1 of the preceding law is the following:

Supreme government of the free State of Coahuila and Texas:

The governor *ad interim* of the State of Coahuila and Texas, exercising the supreme executive power, to all the inhabitants thereof, know ye:

The constitutional congress of the free, independent, and sovereign State of Coahuila and Texas has seen fit to decree—

Article 1. The government can dispose of as much as 400 *sitios* of land of the public lands of the State to meet the public emergency in which it is now situated.

2. It shall prepare regulations for the colonization of said lands under the bases and conditions it may deem proper, without regard to the provisions of the law of March 26 of last year.

3. The government shall provide the necessary means for the collection of whatever is due the State, whatever be its nature and origin.

MONCLOVA, *March 14, 1835.*

On October 3, 1835, a law was passed abolishing the States and dissolving the legislatures and creating departments, articles 1, 2, 3, and 5 of which are as follows:

ARTICLE 1. The governors who at present hold their offices in the States shall so continue, even when they have completed the terms previously established in their constitutions, but subject in their continuance and in the exercise of their functions to the supreme Government of the nation.

2. The legislatures shall discontinue at once the exercise of their legislative functions; but before dissolving and after calling together those that have adjourned, they shall appoint a departmental board, composed for the present of five individuals selected from their own body or out of it, to act as the council of the governor; in case this office is vacant, they shall propose to the supreme Government such persons as have the qualifications that have been required heretofore; and until the Government makes an appointment they shall perform the functions of government through the first one of the laymen named.

3. In the States where the legislatures can not assemble within eight days, the common council of the capital shall act in its stead, solely for the purpose of electing the five members of the departmental council.

5. All the subordinate employees of the States also shall continue for the present, but the places now vacant or that shall become vacant shall not be filled; and they as well as the offices, revenues, and branches of the service they manage are subject to and at the disposal of the supreme Government of the nation, through the proper governor.

On the same day and as part of the same law the President made regulations, articles 10, 12, and 13 of which are as follows:

10. In everything relating to the department of the treasury the governors and the respective officers shall proceed in accordance with the laws, regulations, and orders of each State, in so far as may be compatible with the new organization of said revenues for the future.

* * * * *

12. Said governors, in matters relating to the revenues, shall communicate directly with the supreme Government through the secretary of the treasury, to whom they shall forward all documents and statements and consult when they consider necessary, being careful to cite the laws, orders, and proceedings (*expedientes*) there may be on the matter.

13. Until the attributes of the Government and departmental boards in what relates to the treasury are declared by law, said governors shall make no sales of land (*fincas*) or property (*bienes*), nor contracts nor extraordinary expenses for said department, without the previous approval of the supreme Government.

From the date of the passage of this law the Government ceased to be federal in form and became central in its character.

On October 23, 1835, a basis for a new constitution was adopted, under which the Government was carried on until the adoption of the new constitution, December 29, 1836. This new constitution prescribed with great particularity the duties of each officer of the departments, and nowhere in this constitution is any officer of the departments authorized to make a sale or grant of public lands. Section 3 of article 15 of this constitution is as follows:

> Restrictions on the governors and departmental councils (*juntas*): They can not exercise other powers than those which this law designates for them, the violation of this part of the article and the two preceding ones being a matter involving the strictest responsibility.

On January 17, 1837, a law was passed establishing a national bank and the creation of a redemption fund, articles 2 and 3 of which are as follows:

* * * * *

2. The Government, without loss of time, shall establish and provide regulations for a national bank, with the principal object of redeeming copper coin, the management of which shall be intrusted to persons elected by the different classes of society, in the manner said regulations shall provide, and who shall not be dependent on the Government other than to render thereto an annual report of their administration.

3. There are adjudicated to the bank for a redemption fund:

First. All the real property of the nation that exists in all the territory of the Republic.

* * * * *

On April 4, 1837, a law was passed providing that the Government should proceed to make effective the colonization of the lands of the Republic which contains the following provisions:

The Government, in concurrence with the council, shall proceed to make effective the colonization of the lands that are or should be the property of the Republic, by sales, leases, or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of independence, and for the remuneration and gifts Congress may grant to Indian tribes and nations, and those who assisted in the restoration of Texas,

and it shall not be compromised by the laws heretofore enacted on colonization, which enactments are all repealed in so far as they conflict with this law, but the prohibition of article 11, of the law of April 6, 1830, shall remain in force.

On April 12, 1837, a law was passed creating a national consolidated fund, article 7 of which is as follows:

Art. 7. For greater security in the payment of the capital and interest of the consolidated fund, the Government of Mexico specially mortgages, in the name of the nation, 100,000,000 acres of public lands in the departments of the Californias, Chihuahua, New Mexico, Sonora, and Texas, as a special guaranty of said fund, until the total extinction of the credits; but if any sale of these mortgaged lands should be made, it shall be, at least, at the rate of said 4 acres to the pound sterling, and the proceeds thereof shall be paid by the purchaser to the agents of the Government in London, from whom only he can receive the corresponding warrant, and the latter shall employ the proceeds of the same to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands, at the current price of said bonds in the market.

On April 17, 1837, a decree was promulgated creating the office of "superior chief of the treasury" and providing for the manner of making purchases, sales, and other contracts on behalf of the nation, articles 1, 2, 4, 37, 73, 76, 92 of which are as follows:

ARTICLE 1. Until the general congress establishes the revenues that are to form the national exchequer of Mexico, the revenues, taxes, and property of

which the supreme Government is in possession, and the revenues, taxes, and property which the departments established or acquired under the federal system, and which existed at the time of the publication of the decree of October 3, 1835, shall continue.

2. The revenues, taxes, and property which by the law of the 17th of last January were assigned to the national bank, are excepted from the provisions of the last article until it fulfills its object.

4. Superior chiefs of the treasury shall be located in each department with the powers designated in this decree. All the employees of the treasury in their respective districts, in the instances and manner which shall be designated, shall be subordinate to them.

* * * * *

37. It is the duty of the departmental treasurers: To muster the troops that may be in the capital; to issue to them their vouchers; to make abstracts of the muster and estimates, and to discharge, in the department of war, the powers given to the commissaries-general and auditors of the treasury by the regulations of July 20, 1831, which for the present remain in force in all that is not opposed to this decree and subsequent laws.

* * * * *

73. All the purchases and sales that are offered on account of the treasury and exceed $500 shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the superior chief of the treasury, the departmental treasurer, the first alcalde, the attorney-general of the treasury, and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose,

and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury, for such purposes as may be necessary and to enable him to make a report to the supreme Government.

* * * * *

76. The minutes of the board shall be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme Government, when the case requires it.

* * * * *

92. The powers that by various laws are given to the commissaries-general and subcommissaries shall be exercised in future by the superior chiefs of the treasury and their subordinates, in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed.

December 7, 1837, a law was passed by the supreme Government prescribing the duties and powers of governors, section 2 of article 1 of which is as follows:

It shall be the duty of these officials (governors), in the exercise of the power of supervision given them by the sixth constitutional law in its article 7, part 12 (which article provides that the governors shall watch over the officers of the exchequer of the department in the manner the law shall provide).

* * * * *

Second. To preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter until, in the first or second session thereafter the matter under consideration is more thoroughly examined into.

On September 15, 1837, there was a convention between English bondholders of Mexican bonds and the Mexican Government, section 7 of which reads as follows:

> 7. For greater security in the payment of the principal and interest of the consolidated fund, the Mexican Government, in the name of the nation, specifically mortgages 100,000,000 acres of public lands in the departments of the Californias, Chihuahua, New Mexico, *Sonora*, and Texas, as a special guaranty of said fund until a total extinction of the credits; but if any sale of the mortgaged lands should be made it shall be made at least at the rate of said *4 acres to the pound sterling*, and the proceeds shall be paid by the purchaser to the agents of the Government in London, from whom only he can receive the corresponding inscriptions, and they shall use the proceeds of the sale to redeem the bonds of the new consolidated fund, which may also be received in payment of said lands at the price said bonds have in the market.
>
> The Mexican Government, besides the general mortgage contained in this article, expressly reserves by a public decree 25,000,000 acres of the lands of the Government in the departments of closest communication with the Atlantic and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds in case it is desired to exchange them for lands, and if the Government sell them the proceeds therefrom shall be devoted to the redemption of said bonds.

On June 1, 1839, a law was passed approving the above-named convention, and article 3 of this law is as follows:

> 3. With respect to the colonies that may be established by virtue of the convention, the Government shall see that the existing laws on colonization, or those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself.

On September 28, 1841, "assembled in the general quarters at Tacubaya, at the call of his excellency the general in chief of the army, well deserving of his country, Antonio Lopez de Santa Anna, the generals of divisions, of brigades," and other important officers of the army, and formulated a plan for a new government, declaring that the supreme powers established by the constitution of 1836 should cease in their functions, and making other important provisions as a basis for a new form of government, sections 2 and 7 of which are as follows:

> Second. No other means being known for supplying the will of the departments than to appoint a board composed of two members from each one of them, born therein or citizens thereof and now in Mexico, his excellency the general in chief shall select them, that they may, with full liberty, designate the person in whom the executive power is to be provisionally deposited.
>
> * * * * *
>
> Seventh. The powers of the provisional executive are all those necessary for the organization of all the departments of public administration.

From this date until after the 7th of January, 1843 (the date of the title paper offered in evidence in this case), the Government of Mexico was not only central but also dictatorial in its form.

On May 6, 1850, the legislature of the State of Sonora, which had been rehabilitated by the reestablishment of the constitution in 1846, passed a law, which is hereinafter copied in full, providing for the colonization of the vacant lands within its boundaries, and on May 14, 1851, the constitutional congress of the Mexican nation passed the following law annulling that decree:

> The decree of the legislature of the State of Sonora of May 6, 1850, is unconstitutional, which says:
>
> No. 134. The constitutional congress of the State of Sonora decrees the following:
>
> Article 1. There are colonizable in the State all the desert and vacant lands on its frontiers which belong to it and are not the property of an individual, corporation, or town.
>
> 2. To all foreigners who desire to establish themselves on these lands and who are not disqualified to do so under the general laws, security and protection to their persons and interests are offered.
>
> 3. The State grants to every family settling on said lands one *caballeria* of irrigable agricultural land, which is an area 1,400 *varas* long by 552 *varas* wide, and a *sitio* of 5,000 *varas*, squared, of grazing land, and in addition the necessary land for building houses in town to live in.
>
> 4. The settlers on the lands under this law must establish themselves thereon and cultivate the same to enjoy the products thereof, and shall not alienate them until after six years, under penalty of losing

them and of their passing to another settler who applies for them.

5. For the term of ten years from the establishment of a colony the settlers thereof are exempt from every direct or indirect tax now imposed or that the State may impose.

6. The effects, utensils, lumber, and whatever may be brought in for use or consumption of said colony are also exempt from all duties for said term.

7. All products of the colony are likewise exempt from all taxation in the State.

8. The gold and silver taken therefrom from the time of its establishment are exempt from the assay tax of 3 per cent.

9. The Government is empowered to regulate, in its turn, the government and interior administration in the establishment of colonies that may be made on said lands, to contract for enterprises with this object in view, and to determine the most suitable lands under the purposes and franchises of this law. If for this purpose further privileges are solicited, they may be granted at the discretion of the Government, subject to the approval of Congress.

10. Foreigners established in the colonies shall enjoy all the civil and political rights the laws give them, as also the power they thereby have to acquire every kind of real property.

11. Mexicans and foreigners shall enjoy the same privileges in a colony in Sonora, but in equality of circumstances the Mexican promoter of a colony shall alone be preferred to the foreigner.

12. The colony shall be understood as established as soon as there is gathered together therein at least the number of one hundred families in the sense of a town.

13. To the promoter who contracts for the establishment of a colony, under the articles of this law,

there may be granted as a property 10 *sitios* of grazing land and its *caballerias* of irrigable agricultural land, or 10 of *temporal* land.

14. The colonists, in case of necessity, are obligated to contribute with their persons and interests to the defense of the State and of their new country.

Because it is opposed to article 11 of the act of reforms (Com. Laws, Vol. V, p. 275, No. 2982, May 18, 1847), which says (Comp., p. 284):

"It is the exclusive right of the general congress to establish bases for colonization and to enact laws under which the powers of the union are to perform their constitutional functions."

And to article 2 of the general law promulgated April 25, 1835, which says:

"Art. 2. In the exercise of the power reserved to the general Congress in article 7 of said law of August 18, 1824, the frontier and littoral States are prohibited from alienating their vacant lands for colonization until the regulations to be observed in carrying it out are established."

As above stated, the constitution of 1824 was reestablished provisionally August 22, 1846, which ended the first epoch of the central system of government, and from that date until February 4, 1853, through various tribulations, Mexico was governed nominally by that constitution. On the last-named date the leaders of the army promulgated a basis for a new government, which virtually provided for the election of a dictator.

On March 17, 1853, Santa Anna was declared elected President under this plan, and on the 22d of April of same year he issued his decree establishing "bases for

the government of the Republic until the promulgation of the constitution throughout Mexico," and assumed supreme power.

On November 25, 1853, while exercising this supreme power he issued the following decree:

> Antonio Lopez de Santa Anna, etc.:
>
> Article 1. It is declared that the public lands, as the exclusive property of the nation, never could have been alienated under any title by virtue of decrees, orders, and enactments of the legislatures, governments, or local authorities of the States and territories of the Republic.
>
> 2. Consequently, it is also declared that the sales, cessions, or any other class of alienations of said public lands that have been made without the express order and approval of the general powers, in the manner prescribed by the laws, are null and of no value or effect.
>
> 3. The officials, authorities, and employees upon whom devolves the execution of this decree shall proceed, as soon as they receive it, to recover and take possession in the name of the nation of the lands comprehended in the provisions of article 1, and that may be in the possession of corporations or private individuals, whatever may be their prerogative or position.
>
> 4. The judicial, civil, or administrative authority shall admit no claim of any kind, nor petitions whose purpose is to obtain indemnification from the public treasury for the damages the unlawful holders or owners may allege under the provisions of the preceding article, and they shall preserve their right only against the persons from whom they have the lands they are now compelled to return.

On July 7, 1854, he issued a decree, sections 5, 6, 7, and 8, which are as follows:

Antonio Lopez de Santa Anna, etc.

* * * * *

5. The alienations of public lands, of whatever nature they be, that have been made by the authorities and officials of the departments without the knowledge and approval of the General Government during the epoch when the central system was in force in the Republic are void.

6. Those made by said authorities in the epochs of the extinguished federation are likewise void: *Provided*, They were not made for the purpose of extending and promoting colonization, which was the purpose proposed by the law of August 18, 1824.

7. Grants or sales of lands made to provide individuals, companies, or corporations, under the express condition of colonizing them, and the holders of which have not complied therewith in the terms stipulated, are declared to be of no value.

8. The alienations made by the States or departments and declared void by the three preceding articles may, nevertheless, hold if the holders of the lands obtain the consent of the supreme Government and pay into the public treasury what it considers proper to exact as the value of the land: *Provided*, They apply for this ratification within the time designated in article 2, in which case alone there shall be no further proceedings to annoy or jeopardize them.

* * * * *

14. The law of November 25 of last year remains in force, in so far as it is not in conflict with the present decree.

On March 11, 1854, a revolution was started at Acapulco and a plan adopted. This revolution was finally successful, and on August 16, 1855, Santa Ana fled the country, and on December 3, 1855, the following decree was promulgated:

Juan Alvarez, president *ad interim*, etc., July:

ARTICLE 1. The decrees of November 25, 1853, and July 7, 1854, which submitted to the revision and approval of the supreme Government the grants or alienations of public lands made by the local governments of the States, or departments and territories, of the Republic from September, 1821, to that date, are repealed in all their parts.

2. Consequently, all the titles issued during that period by the superior authorities of the States or territories under the Federal system, by virtue of their lawful faculties, or *by those of the departments or territories under the central system*, WITH EXPRESS AUTHORIZATION OR CONSENT OF THE SUPREME GOVERNMENT for the acquisition of said lands, all in conformity with the existing laws for the grant or alienation, respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the Government.

3. *The alienations of public lands that have been made by the authorities of the States or departments and territories without the requisites referred to in the preceding article* and in contravention of the provisions of article 4 of the law enacted by the general Congress on the 18th of August, 1824, *are void and of no value*, and the holders of that class of lands are subject to the penalties established by existing laws in the Republic for those who acquire

property in an unlawful and fraudulent manner, unless they promptly obtain the approval of the supreme Government, to which they shall apply therefor through the department of public works.

4. All titles of acquisition of public lands which, under the law of July 7, 1854, have been presented to the department of public works for their ratification, under the provisions of articles 5 to 8 of said law, shall be returned to their respective owners without requiring payment of any kind of them. With regard to those in the case stated in article 3, proceedings shall be taken in the manner provided for in the same.

The grants of sales of public lands made by competent authority and under the laws in force in their case with the express obligation on the part of the new holders to colonize them in a given time without their having complied therewith in the manner stipulated, are for that reason alone void and of no value, and said lands shall again become the property of the nation.

* * * * *

To summarize, as to forms of government in Mexico for the several periods from its independence up to 1843: From the date of its independence to July, 1822, the Government was provisional, under the Plan de Iguala. From July, 1822, to April, 1823, it was nominally governed by a constituent Congress provided for by that plan, but during most of that time was actually an empire under the government of Iturbide. From April, 1823, until January 31, 1824, the constituent Congress, elected under the provisions of Plan de Iguala, resumed its functions and on the latter date adopted what is known as

the "constitutive act," under which the Government of the country was carried on until the adoption of the constitution on October 4, 1824.

The country remained under this constitution until October 3, 1835, when the federal form of government was abolished and the central form was established, the States being abolished and departments created instead of both States and territories; and immediately afterwards, on October 23, 1835, bases for a new constitution were promulgated, under which bases the country remained until December 29, 1836, when the new constitution was adopted; and under this constitution the country was governed until September 28, 1841, when the plan known as the "Bases de Tacubaya" was adopted, and the Government became not only central, but dictatorial, and so remained until after the date of this grant.

To summarize as to laws in respect of the public lands of Mexico. The first law on this subject was promulgated by Iturbide January 4, 1823, and was known as "the colonization law of Iturbide," which was repealed on April 11 of the same year, and the next law passed by the general constituent Congress of the Mexican nation on August 18, 1824, and is generally known as the colonization law, and this law provides for the disposition of lands not only to foreigners, but to Mexican citizens as well, and the latter were to be given preference in the distribution of lands.

Following this, the regulations of 1828 with reference to the colonization of lands in the Territories were promulgated.

On January 26, 1831, a general department of revenues was created, which is supplemented by the regulations of July 20, 1831, providing for the manner of making all purchases, sales, and contracts. On April 25, 1835, a law was passed annulling the colonization law of Coahuila and Texas and prohibiting the sale of the public lands in the border and littoral States for colonization thereon until the rules for so doing should be established.

On April 4, 1837, all colonization laws were repealed, and this law was supplemented by the decree of April 17, 1837, providing a general scheme for the administration of the revenues and of the treasury department of the nation and specifically providing for the manner of making all sales on account of the treasury.

It will be noted that the regulations of July, 1831 (which, by the expressed provisions of the decree of April 17, 1837, remained in force), contained elaborate provisions for all sales, purchases, and contracts on account of the treasury, and the decree of April 17, 1837, also contains like provisions where the amount of the sale exceeds $500.

It is proper to note here that the officer having these matters in charge, under the law and regulations of 1831, was called commissary-general. This office was abolished by the decree of April 17, 1837, and his duties and powers devolved upon the superior chief of the treasury; this office was in turn abolished by the decree of December 16, 1841, and these powers and duties were conferred upon the departmental treasurers.

During the period beginning August 18, 1824, and ending April 4, 1837, several of the States of the Mexican Republic had asserted power to dispose of the vacant public lands located within their respective boundaries, and had passed laws for their colonization and disposition by sale and otherwise, but after April 4, 1837, no public assertion of the power in a State to dispose of the public lands was made, without a direct and immediate declaration on the part of the supreme Government that such an assertion was unconstitutional and contrary to the general law of April 25, 1835.

Having, at much greater length than we had anticipated, reviewed the history of Mexico, it is proper that we should examine the title paper offered in evidence in this case in order that its validity may be tested, in view of the condition of the laws of Mexico at the time it was made and the history of that country at that time and prior thereto; and in so doing we can not do better than to keep in mind as a bright and shining star which shall illuminate our path throughout this investigation an expression of this court in the case of the United States *versus* the heirs of Hartnell in the twenty-second volume of Howard's Reports, at page 288, where the court says:

> *The public domain* [*of Mexico*] *was the property of the Mexican nation*, and those who are enabled to displace that title, separate portions of it from the public lands, and vest such portions in individual proprietors by perfected titles could only do so in the exercise of sovereign power, because *the public title was a sovereign right*, and agents who assumed to exercise this authority must show that they represented the nation.

In a country like Mexico, whose government is and was by written laws and written orders and decrees having the force and effect of law, those agents who purport to exercise this sovereign right must of course derive their authority to represent the nation from its laws, and it would seem natural that the laws conferring this power should be recited in the title paper relied upon to support this claim; and certain laws are referred to in the titulo in this case, namely:

First. The law of August 4, 1824 (erroneously cited as of August 10, 1824), relating to the classification of the revenues, which is set forth in full at page 1 of appendix to original brief for the Government.

Second. Law No. 30 of the State of Sonora, dated May 20, 1825, which is set out in full at pages 65 to 68 of appellants' brief.

Third. Law of the State of Sonora of July 11, 1834 (which is a practical reenactment of law No. 30 last above cited), and which is to be found at pages 69 to 73 of appellants' brief.

Fourth. Article 1 of national decree of April 17, 1837, which is set out in full at page 12 of this brief.

Fifth. National decree of December 28, 1839 (erroneously cited as of April 28), which is set out at the top of page 13 of appendix of the original brief for the United States.

Sixth. National decree of December 24, 1840, which is set out at page 13 of appendix to original brief for the United States.

Seventh. Supreme national order of December 24, 1840, which counsel for both parties have been unable to find and which is probably a mistake.

Eighth. Article 76 of national decree of April 17, 1837, which is set out at length on page 14 of this brief.

Ninth. Article 2 of decree No. 51 of the State of Sonora of May 12, 1835.

NOTE.—We are unable to furnish a copy of this decree, but from recitals in the title paper it is fair to assume that it provided for the resurvey of grants which, by reason of inaccuracies in the original survey or because never located, being grants of a given quantity within outboundaries containing a larger quantity, were supposed to contain more land than had been sold or granted; and it is further fair to assume, from recitals in this title paper, that one of the provisions of this decree was that unless the excess was equal to 1 sitio (Mexican square league) the inaccuracy should be disregarded, and if the excess exceeded 1 sitio same was to be sold, the owner of the original grant being accorded a preference right to purchase or "denounce" the same. (See pp. 3 and 13 of supplemental printed transcript.)

Tenth. Article 73 of national decree of April 17, 1837, which is set out in full at page 13 of this brief.

Eleventh. Clause 2 of article 1 of original law of December 7, 1837, which is set out in full at page 14 of this brief.

In addition to the laws cited in the title paper, counsel for appellant has in his brief referred to certain other laws as authority for the making of this grant, namely:

Twelfth. Article 3 of the colonization law of April 18, 1824, which is set out in full on page 3 of this brief; and

Thirteenth. The law of January 26, 1831, which is set out in full at page 4 of this brief.

Fourteenth. The law of May 21, 1831, which created the office of commissary general, and the regulations of July 20, 1831, which are set out at page 4 *et seq.* of this brief.

It will be noted that, of the laws hereinbefore cited, some are laws and decrees of the supreme Government of Mexico, while others are laws and decrees of the congress of the State of Sonora, each providing for the disposition of the public lands; and it would seem that one should be able to learn from the brief and argument of counsel for appellants upon which of these two classes of laws the claimant relies as authority for his grant, both being apparently in force at the same time, each having different provisions, and each referring apparently to the disposition of the same class of lands, but we find upon examination of the brief for appellants that on page 42 he says: "It is obvious, as we submit, that the laws of 1825 and 1834 (State laws of the State of Sonora) *under which this grant was made* contemplated in all cases a survey and appraisement of the land surveyed and a sale of the same land," while on page 54 of this same brief, after citing and quoting from the national laws with reference to the disposition of the public domain, counsel says: "It is thus seen that this grant was made by the departmental officials, who were *acting under the laws of the supreme Government*, and that it was made in accordance with *the laws of the supreme Government*."

This being the case, counsel for the United States will take up these two claims separately, and

First. As to the claim made that this is a grant made under the laws of the State of Sonora, which counsel

claims were kept in force by the provisions of article 10 of the regulations of October 3, 1835. (See p. 9 of this brief.)

In order that this matter may be discussed intelligently we will endeavor to put the position of appellants' counsel as strongly as possible in a few words. As we understand it, it is this:

1. That by the law of August 4, 1824, providing for the classification of the revenues (see p. 1 of appendix to original brief for the Government), the revenue to be derived from the sale of the public lands of the nation was considered as one of the national revenues to be classified, and that as the revenue from this source was not reserved to the nation, the right to such revenue passed to the States under article 11, which provided that "the revenues not included in the foregoing articles belong to the States."

2. That article 3 of the colonization law of August 18, 1824, which provided "for this purpose (the colonization of the lands of the nation) the congresses of the States shall enact as soon as possible laws or regulations for the colonization of their respective demarcations in strict conformity with the constitutive act, the general constitution, and the rules established in this law," gave to the States full power and authority to dispose of the public lands within their respective boundaries, and that this provision, taken in connection with the law of August 4, above cited, gave to them both the power to dispose of such public lands and the right to the revenue arising from such disposition.

3. That the laws of the State of Sonora of May 20, 1825, and of July 11, 1834, were passed by virtue of the authority and power conferred upon the State of Sonora by said acts of August 4 and August 18, 1824.

4. That by the provisions of article 10, of the regulations of October 3, 1835, these laws were kept in force, and this grant was made in conformity with the provisions of those laws.

Were it necessary, the Government might at this time call attention to the fact that the only person authorized to make sales under the laws of Sonora above referred to were the treasurers of the several States (afterwards departments), and that no such a body as a "board of sales" is known to or provided for in those State laws. It might also call attention to the fact that by the provisions of the State law of 1834, one of the duties of the auditor was (see section 8, article 38 of chapter 3 of the decree of the State of Sonora of July 11, 1834) "to correctly keep the book of Toma de Razon of every title, commission, or order of payment the Government shall issue, and to order the first officer *to literally copy their contents with due* separation," and that no such literal copy was ever made of the grant in this case. But it is not necessary to refer to these irregularities and omissions, however fatal they may be to the validity of this title under the treaty of 1853, for we are perfectly confident that no power whatever existed in the departmental officers in 1841 to 1843 to make this grant or to make any disposition whatever of the public domain of the Mexican nation.

The Government is not asserting a right under the act of January 17, 1837; it is merely using the provisions of that act as it was used by the National Government of Mexico on April 17, namely, as descriptive only of the revenues, taxes, and property which were by that act assigned to the several departments. In other words, by the act of April 17, 1837, the Government of Mexico decreed that certain revenues, taxes, and property which they had theretofore enjoyed should continue in the departments, with the exception of certain of said property which had theretofore been described in another act of the same Government; and in order to learn what that exception was, and not for the purpose of asserting a right under the act, resort must be had to the act so referred to.

Resort being had to that act, we find that the very class of property here in question, namely, the real property of the nation, was there expressly described, and is hence excepted from the provisions of article 1 of the act of April 17, 1837.

If this be conceded, the other revenue laws referred to, namely, that of December 28, 1839, and December 24, 1840, may also be passed as not in any way affecting he questions involved in this case.

The position taken by the Government with reference to the effect of those laws is further strengthened and supported by the fact that at all times from the organization of the central Government to this day the Mexican nation has, from time to time, made laws with respect to the disposition of its public domain wholly inconsistent with the

existence of any right, in any State or department, to such lands. This is notably the case with reference to the law of April 25, 1835 (see p. 7 of this brief), where the supreme government declares unconstitutional and void a law of Coahuila and Texas asserting the right to colonize its vacant lands.

Also in the elaborate and minute provisions in the law and regulations of April 17, 1837, for the disposition of these same lands in all the departments, whether consisting of former States or territories, for it is impossible to conceive of such a duplex condition of affairs with reference to the disposition of the public lands, as to the necessary result from the recognition of a right in the State of Sonora to sell lands at less than 4 cents an acre, as was done in this case, where the minimum price fixed by the supreme law of the National Government was $1.25 per acre.

Again, the law of January 17, 1837, adjudicating to the national bank for a redemption fund "all the real property of the nation that exists in all the territory of the Republic," was wholly inconsistent with the recognition of any right in the States to dispose of the same real property. Again, on April 12, 1837, the supreme Government mortgages to the London bondholders 1,000,000 acres of land for the security for its bonds, and by divers laws has made provisions out of the public lands in the States for soldiers who have served in the different wars of that country; and on May 14, 1851, while the reestablished constitution of 1824 was in force in Mexico, the constituent Congress of that nation

declared a colonization law which had been passed by Sonora on May 6, 1850, by which that State asserted the right to colonize its lands, to be unconstitutional and contrary to the provisions of article 2 of the law of April 25, 1835. (See p. 17 of this brief.)

This act of Congress is a legislative construction of article 2 of the act of April 25, 1835, and having been made prior to the treaty with this Government is absolutely binding upon this country and its courts, and by it it is declared as the true construction of that act that the States had no right after its passage to colonize or otherwise dispose of the vacant public lands within their boundaries.

In other words, if the Sonora act of May 6, 1850, was contrary to the provisions of article 2 of the general law of April 25, 1835, then the necessary effect of that article was, as to all border and littoral States, to repeal all laws in those States affecting the colonization or disposition of the public lands.

But it is asserted that the laws of Sonora of 1825 and 1834 were not colonization laws, but were laws providing for the sale outright of the vacant public lands to Mexican citizens, and hence do not come within the inhibition of article 2 of the act of April 25, 1835.

The answer to this is that the only authority by virtue of which the State of Sonora could assume to dispose of the public lands of the nation is article 3 of the act of August 18, 1824, which authorizes the congresses of the States to "enact as soon as possible laws or regulations for the *colonization* of their respective demarcations," and

if those laws were not *colonization* laws they were passed without any authority whatever. Again, the law of August 18, 1824, was intended to cover every manner of disposition of the public lands and it was all called colonization. It is true that in articles 1, 6, 7, and 8 foreigners are expressly referred to, and expressed provisions and prohibitions with reference to their colonization are made. But taking the whole act together, the word colonization is evidently used in the same sense as the word settlement is used with reference to our public lands; and whether the lands were conceded to a contractor like an empresario or whether they were sold to native citizens, it was all referred to as colonization, and, as has been frequently held by this court, that law furnished the only authority in Mexico for many years for the disposition of the public lands.

That this law treated the vacant public lands as national property is apparent from the second article (see p. 2 of this brief), where it is said "the object of this law is those lands of the nation which, not being private property nor belonging to any corporation or town, can be colonized." This is an emphatic declaration on the part of the constituent Congress that all lands not being private property or belonging to any corporation or town were the property of the nation, and that that act was intended to provide a means for the disposition of all such lands.

Not only this, but the same construction was put upon this act by the regulations of 1828, for by virtue of the provisions of the sixteenth article of this act, which provides that "the Government under the principles estab-

lished in this law shall proceed to the *colonization* of the territories of the Republic," those regulations were promulgated.

Under this power to proceed to the "*colonization*" of the territories Congress proceeded to provide, on November 21, 1828, for the disposition of all public lands in the territories not only to foreigners and emigrants in numbers, but also to private persons and families, and these regulations expressly refer to article 16 as the authority under which they are made. So we take it that there can be no question that the word "colonization" as used in the general law of April 25, 1835, and as used in the general decree of April 4, 1837, applies equally to sales to private persons, whether Mexican citizens or foreigners, as to those who should emigrate in numbers.

Again, on November 25, 1853, while Santa Ana was exercising supreme executive and legislative power, and at the very time when his right to do so was being recognized by the political department of this Government, he made a decree declaratory in its form that "the public lands, as the exclusive property of the nation, never could have been alienated under any title by virtue of decrees, orders, or enactments of the legislatures, governments, or local authorities of the States and territories of the Republic."

It is a well-known historical fact that the power to construe the constitution and laws of Mexico was vested in the legislative department of the Government, and that decisions of that department construing or declaring unconstitutional or otherwise any law of the nation was

entitled to the same conclusive force and effect as an adjudication of like character by the highest judicial authority in this country is accorded here.

Bearing this in mind and also bearing in mind that Santa Ana was at that time recognized not only in Mexico, but by this country as having supreme power in Mexico, the great weight, nay, the controlling weight, that should be given to this declaration will be appreciated.

But it is said by counsel for appellants that this decree "refers exclusively to grants made by the States, and that the grants made by the departments were not referred to until the decree of July 7." (See p. 11 of reply brief.) An examination of the decree itself (see p. 20 of this brief) will disclose that it refers not to "grants made by the States" but to grants made *by virtue of the enactments of the legislatures of the States.* Now, if this grant was not made "by virtue of an enactment of the legislature" of the State of Sonora, counsel for appellants is grievously mistaken when he says, on page 42 of his brief, "it is obvious, as we submit, that the laws of 1825 and 1834, under which this grant was made, contemplated in all cases a survey, etc." The laws of 1825 and 1834 were "enactments of the legislature of the State" of Sonora and were the very "enactments," and such grants as this were the very class of "alienations," which were aimed at by that decree.

Again, on July 7, 1854, a similar decree was entered providing that "the alienations of public lands of whatever nature they be that have been made by the authorities and officials of the departments without the knowledge

and approval of the General Government, during the epoch when the central system was in force in the Republic, are void." (See p. 21 of this brief.) It is true as stated by counsel that this decree was made after the date of the treaty, and it is also true that if it were an original law, intended as amendment to any existing law, it would have no force or effect upon rights acquired under the treaty, and it is conceded by counsel for the Government, that even as a declaratory law it is not absolutely binding upon the courts of this country, but we do insist that it is authority, persuasive in its character as to the construction which the people of that country put upon its laws so short a time after the date of the treaty; and especially so when it is perfectly consistent, and in harmony, with all former declarations and decisions upon the same subject.

But counsel for appellants insist that these laws or decrees were both repealed by the act of December 3, 1855. This is true; they were repealed in terms, but were in terms reenacted so far as applicable to this grant. Section 2 of the decree of December 3, 1855, is as follows: "Consequently all titles issued during that period (from September, 1821) by the superior authorities of the States or territories under the federal system by virtue of their lawful faculties *or by those of the departments or territories under the central system with express authorization or consent of the supreme Government for the acquisition of said lands* * * * *shall be for all time be good and valid.*" * * * And section 3 of that act provides that "the alienations of public lands that have been made by the

authorities of the States or departments and territories without the requisites referred to in the preceding article * * * are void and of no value." * * * (See p. 22 of this brief.) So that the very law which counsel contends repealed the decrees of Santa Ana of November 25, 1853, and July 7, 1854, recognized and declared as a correct principle of Mexican law the very proposition contended for here, namely: That all grants or alienations of public lands in the nation made under the central system without the express authority or subsequent approval of the Mexican nation are void. So that by all these laws of April 25, 1835 (see p. 7 of this brief); January 17, 1837 (see p. 11 of this brief); April 4, 1837 (see p. 11 of this brief); April 12, 1837 (see p. 12 of this brief); April 17, 1837 (see p. 12 of this brief); September 15, 1837 (see p. 15 of this brief); June 1, 1839 (see p. 16 of this brief); November 25, 1853 (see p. 20 of this brief); July 7, 1854 (see p. 21 of this brief), and December 3, 1855 (see p. 22 of this brief), the Mexican nation repeatedly, publicly, and forcibly declares the public lands in all the departments of the nation to be the property of the nation itself, and that the same could only be disposed of by its authority or with its approval, and each of them shows that the laws of Sonora of 1825 and of 1834, whatever force they may have had during the federal system, were absolutely void in so far as they sought to provide for the disposition of the vacant public lands during the central system.

And secondly, as to the claim made that this grant was made by departmental officials who were acting as national officers and under the laws of the supreme

Government. It will be noted that these laws are as follows:

The law of April 4, 1837 (see p. 11 of this brief).

The decree of April 17, 1837 (see p. 12 of this brief).

The regulations of July 20, 1831, which remained in force by the express terms of the decree last above cited (see p. 4 of this brief).

The law of December 7, 1837 (see p. 14 of this brief).

It will be noted that by the law of April 4, 1837, above cited, the supreme Government assumes control of the colonization and disposition of all the public lands in the nation, and that the regulations provided in the decree of April 17, 1837, are but to carry out the provisions of the law of April 4 of the same year.

It is a rule of construction in all countries governed by the civil law that repeals by implication are favored, and that a subsequent law upon the same subject repeals a former law by implication unless by the terms of the latter law the former is kept in force. Hence the necessity of providing, as does the decree of April 17, 1837, that the regulations of July 20, 1831, should remain in force except where it was repugnant to the terms of the latter. The regulations of April 17, 1837, required that all purchases and sales exceeding $500 should be made by a *board of sales* constituted as therein provided; but no provision is made in those regulations for sales which do not amount to $500, and as this sale does not amount to that sum, resort must be had to the regulations of July 20, 1831, as amended by the law of December 7, 1837.

By article 126 of the regulations of July 20, 1831, it is provided that "all purchases, sales, and contracts made

on account of the treasury, whatever be their purpose, shall be made by the commissaries-general, sitting as boards of sale; *but before convoking them it shall be absolutely necessary to receive first the order therefor, either from the supreme Government, communicated directly or through the treasurer-general,* or from the directory of the revenues when it relates to matters subject thereto." (See p. 4 of this brief.) It was then substantially provided that the other members of the board should be the senior officer of the treasury and the attorney-general, and these were to constitute the regular members of the board. Besides these, it was provided that there should be special members from the different departments, depending upon the nature of the transaction pending.

This act was amended by the law of December 7, 1837 (see p. 14 of this brief), by providing that the governor should preside over the boards of sale. Hence, this board under the national law as in force in 1842 and 1843, consisted of the governor, the departmental treasurer (who had succeeded to the powers and duties of the commissary-general, as hereinbefore explained), and the attorney-general, with such special members as might be proper, but before convoking this board it was absolutely necessary, under these regulations, that there should be an order from the supreme Government.

It is urged by counsel for appellants that the departmental treasurer, having succeeded powers and duties of the commissary-general and of the superior chief of the treasury, was an officer of the Supreme Government and represented the supreme Government, and it is a fair construction of his argument to say that he contends that

the participation in this sale by the departmental treasurer, and his approval of the same, is equivalent to the approval of the supreme Government; and at this point counsel desire to call the attention of the court to the express provision that the commissary-general was without power to convoke a board of sale without express authority from the supreme Government, and that a distinction is drawn all through the regulations of 1831 and all through the regulations of 1837 between departmental officers and those of the supreme Government.

For instance, in article 133 of the regulations of 1831, it is provided that "the commissaries and subcommissaries shall forward the proceedings with their report thereon to the supreme Government, without whose approval the purchase, sale, or contract shall not be carried into effect" (see p. 7 of this brief); this article of these regulations, kept in force as it is by the provisions of the decree of April 17, 1837, is especially important, not only as requiring the approval of the supreme Government, but as showing a marked line of distinction between the commissaries and subcommissaries and other members of the board of sale therein provided for and the supreme Government, for if these commissaries or commissaries-general represented the Government, and if their participation in the sale or approval of the same was sufficient to bind the Government, why the provision that they should forward the proceedings to the supreme Government, and the further and more important provision that without the further approval of that Government the purchase, sale, or contract should not be carried into effect?

This same line of distinction is recognized in the regulations of April 17, 1837, where by article 76 an authenticated copy of the minutes of the board was required to be transmitted to the superior chief of the treasury to enable him to make a report to the supreme Government when the case required it. If the superior chief of the treasury was the supreme Government, or represented the supreme Government to such an extent that his participation in these sales or approval thereof was equivalent to the approval of the supreme Government, why these repeated and express provisions that these officers should transmit their proceedings to that supreme Government for its approval?

It is thus seen that these laws are all in harmony; that by the law of April 4, 1837, the central Government asserted in itself the right to regulate the colonization and disposition of the national lands; that by the regulations made thereunder no sale or contract could be made without its expressed authority or approval; that wherever any State sought to assert a right to colonize or dispose of the same independently of the supreme Government during the central system that Government without delay (as in the act of May 14, 1851, see page 17 of this brief) asserted its prerogative and repudiated the authority so claimed.

There is no claim in this case that this grant had ever been approved by the supreme Government of Mexico prior to the date of the treaty; on the contrary, the entire theory of appellants is that their title is perfect and complete without such approval, and yet in their title

paper and in their briefs they repeatedly cite and quote from laws which expressly require the authorization by the supreme Government and the subsequent approval before any grant or sale could be carried into effect.

Such is the condition of this case as to the question of power to make the grant, and this is the question which we meet at its threshold, for if there was no power to make the grant, or if that power was not "lawfully and regularly" executed, then the Court of Private Land Claims had no right to confirm this claim. (See first clause of section 13 of the act creating the Court of Private Land Claims, approved March 3, 1891. 26 Stat. L., p. 854.)

And when in connection with these provisions of law in force at the time the decree of Santa Ana of November 25, 1853, and that of the same Government of July 7, 1854, and that of the national Congress of Mexico on December 3, 1855, is taken into consideration, the conclusion is absolutely irresistible, that all titles purporting to have been made under the Sonora laws of 1825 and 1834, which were made subsequent to April 25, 1835, without the previous authorization or subsequent approval of the supreme Government, are absolutely null and void.

Counsel for appellants in his amended brief puts great stress and repeatedly and persistently refers to the opinion "of the *Mexican attorney-general.*" The court will note that this "*Mexican attorney-general,*" who is so frequently referred to, and whose opinion is so confidently relied upon by counsel for appellants, was an officer of the department of Sonora, and was not an officer of the

Mexican nation, and no more weight should be given to his opinion than to that of any officer who is participating in a sale which the laws of his country forbid, and who was at the time participating in an attempt to deprive the Mexican nation of a part of its public domain in direct violation of the laws of his country; and in this connection it might be well to call the attention of the court to the opinion of another Mexican official, who did not represent a department, but who was a high official of the Mexican nation, and whose duty it became to pass upon the validity of this same grant while chief of the department of public works a department in Mexico similar in its functions and authority to the Interior Department in this country.

It will be remembered that this grant came before that department upon the petition of Camou for leave to purchase the *demasias* or surplus therein, and in passing upon the validity of this title the chief of the department of public works decides as follows: The President "has been pleased to direct that the approval of the ajudication be suspended until it becomes known whether or not it prejudices the growing town of Nogales, and likewise until the validity and legality of the title on which it is pretended to hold said ranch is established, substantiation of which is so much the more necessary as there depends upon it not only the proof that there is an overplus (*demasias*), but also whether Mr. Camou can not sell lands to the railroad company and to those who desire to locate in said town, whose progress encounters an obstacle in the exaggerated pretensions of Mr. Camou, as has been

manifested to this department in various communications that have been directed to it, it being a fact that everyone doubts the legality of the title alleged by Mr. Camou; that in regard to this doubt, there is reason to entertain it, inasmuch as in said proceedings of denouncement, when giving the statement of the proceedings, it is said literally, 'I hereby state that I have seen and returned to the party interested the authenticated copy of the title of ownership of seven and one-half square leagues short, which was issued to Jose Elias Gonzales and Mrs. Belbanera Redonda, in the city of Arispe, by the departmental treasurer of Sonora, on the 7th of January, 1843;' this statement disclosing the fact that the origin of the property or the original title was vicious and null, as the sale was made and title issued by a departmental treasurer, and in the year 1842, when the bases of Tacubaya were in force—that is, when the National Government was not only central, but dictatorial, which two circumstances give the title in question the character of manifest nullity;" and it is for this court to decide whether they will follow an opinion of an attorney-general of a department, who was himself participating in the very act upon which he expressed an opinion, which act was in direct violation of the laws of the nation, or whether they will follow an opinion rendered by the chief of the most important department in the Mexican nation, when passing upon the validity of this very title.

Another defect in this title paper, or testimonio, to which we desire to call the attention of the court is the absence from the expediente of the petition of Elias to

purchase this land, and the absence of this very important document, the very foundation of the proceedings under which appellant claims, is especially noticeable in view of the very voluminous nature of the recitals of other and much less important matters.

And the absence of a copy of the petition from the title paper has been held not only to be irregular, but absolutely fatal to the validity of the grant. (*U. S.* v. *Cerubuston*, 20 How., 59.)

As to the question whether this was a grant by quantity or one within the outside boundaries, we have always understood that the true and absolutely conclusive test on this question was how the purchase price was ascertained; in other words, whether it was a sale of property for so much in gross, or whether it was a sale at so much per foot, per acre, or per league, as the case may be.

The proceedings throughout this case show that the purchase price was ascertained by fixing a certain price per *sitio*, and that that price was the minimum price at which the departmental officers were authorized to sell this land, even under the State law; and all the cases cited by counsel for appellants to the effect that by the rules of the common law where a sale is made of a tract of land, described by its boundaries, for a purchase price in gross, the quantity recited, and courses and distances must give way to actual boundaries fixed, have no application whatever to this case.

It is urged by counsel for appellants with great persistency that juridical possession was given in this case, and to support his position that where juridical possession

is given, that such act conclusively fixes the boundaries he cites the Malarian Case (1 Wallace, 289); *Graham* against *The United States* (4 Wallace, 259); *Moore* against *Steinbach* (127 United States, 80); *United States* v. *Pico* (5 Wallace, 538).

In the Malarian Case the act of juridical possession is recited in the *expediente* as follows:

> Within four months after the issue of the grant he (the grantee) presented that instrument to the judge of the district and requested him to designate a day for delivering the possession. The judge designated a day and directed that the adjoining proprietors be cited and that measurers and counters be appointed. On the day designated the proprietors appeared, and two measurers and two counters were appointed and sworn for the faithful discharge of their duties. A line provided for the measurement was produced and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to to the center of the land and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact by pulling up grass and making demonstrations as the owner of the land.

In *Graham* against *The United States*, *supra*, Mr. Justice Field, delivering the opinion of the court, thus described the act of the juridical possession:

> The Mexican law as well as the common law made a formal delivery of possession or "livery of seizin" of the property assigned *after the execution of the grant* necessary to the investiture of the title. This proceeding was usually taken by the magistrate of

the vicinage, and attesting witnesses in the presence of the adjoining land proprietors, who were summoned for the occasion.

In the Pico Case, *supra*, the original act of juridical possession is shown by the evidence to have been destroyed. It does not appear from the opinion what the acts constituting the delivery of juridical possession were, but an examination of the original record discloses that something like a year after the concession a judicial officer, in the presence of two witnesses and of all surrounding proprietors, went upon the land and then and there measured off the land which had been theretofore conceded, with a line or cord, and then and there, in pursuance of the concession theretofore made, and in regular form under the Mexican law, put the grantee in possession.

In the case of *Moore* against *Steinbach*, *supra*, the act of juridical possession is recited in the grant as follows:

The grantee was required to "petition the proper judge to be put in judicial possession by him, in virtue of this document (the grant), by whom the boundaries shall be marked out, on the limits of which he shall place proper landmarks * * *." This requirement of the grant was not complied with, and the court says with reference to this failure: "The grantees were not invested with the title, and could not be, without an official delivery of possession under the Mexican Government, and such delivery was not had and could not be had after the cession of the country, except by American authority acting under a law of Congress."

Now, in all candor, we ask the court to examine the facts with reference to the act of juridical possession in each

one of these cases and, bearing in mind that it is a solemn judicial act and the final act investing the grantee with the title and possession of the property granted, compare those recitals with the facts in this case, which appellants' counsel insists are entitled to the same great weight which Mexico and the courts of this country have always given to this solemn act. Counsel for appellants says in his brief that the said 7½ sitios of land "was on April 7, 1843, the date of the grant, delivered by Ignacio Lopez, the treasurer-general of the department of Sonora (an office, by the way, unknown to Mexican law at that time), in the presence of two witnesses, Antonio Teran y Peralta and Joaquin Urias, to the grantees."

The objections to this statement are that in the first place Ignacio Lopez was not a judicial officer and had no authority to perform a judicial act, and the act of delivering juridical possession has always been construed to be a judicial act, and has usually been performed by the alcalde of the vicinage.

Second. Neither Ignacio Lopez nor the attending witnesses nor the grantees were on the 7th day of January, 1843, upon the land nor within hundreds of miles of there, but were at the city of Arispe.

Third. The coterminous proprietors were none of them called to give assent to this final act in the transfer of this title.

Fourth. It was not accompanied by any physical act on the part of the grantee, accepting or taking possession of the grant itself; it is not recited that he "plucked grass," "cast stones," or did any other act showing that he entered into possession of the property.

Every element which tends to give to this solemn judicial act its weight, as a final conclusion and determination of all that had proceeded, is wanting in this case. There is no judicial officer, there is no person upon the ground, there is no assent by the coterminous proprietors, and there is no acceptance of actual possession by the grantee, each of which enter into and are important elements in the act of juridical possession, which, as this court has frequently said, is analogous to our former "livery of seizin."

As to the monuments, the South Cross monument of this grant (found by Oury), was erected in 1882, nearly twenty years after this country had acquired this territory by the Gadsden purchase (see p. 104 of printed transcript), where it is recited that on the 9th day of September, 1882, the official surveyors appointed to survey this grant made search for that monument and found "that time had taken it upon itself to destroy the oak-tree landmark," and then he proceeded to measure 400 cords from a spring, and at the termination of such measurement he established a boundary and "a monument of stone and mortar" was built. As to the southwest corner, the undisputed testimony in this case shows that that monument was recently constructed and was built about the same time as the South Cross monument above referred to. (See testimony of Flipper, p. 61, of printed record.)

He further testifies that the north cross monument is not a monument at all; that it has more the appearance of an ant-hill; that what is claimed to be the northeast

corner monument is a recent one, and is constructed of loose rock, and that the northwest corner monument can not be found at all. (See testimony of Flipper, pp. 62 and 63 of the record.)

It is urged by counsel for appellants that "if it is true that under any Mexican law the purchaser of a tract of land, sold for a something gross, and containing a description by which its exact boundaries can be ascertained, bought such land subject to a remedy on the part of the Mexican Government, for an excess, when such land passed to the United States, it is no longer held subject to such remedy, for no such rule of law applies here.

Upon this proposition counsel for the Government take issue, and can not do better than to state its position by traversing the proposition in terms—that is to say, the position of the Government is, that if, under the Mexican law, as is practically conceded by the brief of counsel for appellants, the purchaser of a tract of land buys it subject to any remedy on the part of the Mexican Government, for an excess or *demasias*, that when such land passes to the United States this country acquires all the rights of the Mexican Government, and is only bound by the same obligations that the Mexican Government would be, had no change of sovereignty taken place, and even if this grant had been made by proper authorities, it is practically conceded in this case that, by a proceeding had in Mexico, the grantees have received all that they bought and all that they were entitled to under the law of Mexico. This being the measure of their claim, the grant has been fully satisfied.

It is contended by counsel for appellants that as the departmental officers of Sonora made this grant, and as they were public officers, the presumption arises that they acted within the scope of their authority, and that their acts should be presumed to be valid, even if no law can be found conferring upon them this authority, and several cases involving the validity of grants made by officers of the Spanish Crown are cited in support of this proposition.

A complete answer, as applied to the facts of this case, is found in the opinion of this court in the case of the *United States* against *Cambuston*, in the twentieth volume of Howard's Reports, at page 59 (*loc. cit.*, 63), where the court says—in discussing the questions whether the fact of habitual grants of lands by Mexican governors of the Territory of California to settlers, and whether the customary mode and manner in making grants, do not furnish presumptive evidence both of the existence of the power and of compliance with the forms of law in the execution:

"We are aware that the affirmative of these questions has been frequently determined by this court in cases involving Spanish titles in the Territories of Louisiana and Florida. * * * But no such presumptions are necessary *or admissible in respect to Mexican titles* granted since the act of August 18, 1824, and the regulations 21st of November, 1828;" and in the case of *United States* against *Hartnell*, heretofore cited, this court emphasizes this proposition by expressly deciding that where one claims under a Mexican grant he "*must show that the granting officer represented the nation.*"

Confident that this grant was made without authority in the officers who purport to have made it; that if a grant at all, it was one by quantity, and can be, and has been, fully satisfied by the Mexican nation within its own boundaries; that it was never "duly recorded" as required by the terms of the treaty, and that for all these reasons the claim is not one protected by the terms of the treaty, nor within the power of the Court of Private Land Claims to confirm under the act of March 3, 1891, the United States asks that the judgment of the court below be affirmed.

HOLMES CONRAD,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

LUMAN F. PARKER,
Of Counsel.

Office Supreme Court, U. S.
FILED.
JAN 5 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 429

SANTIAGO AINSA, Administrator with the will annexed of Frank Ely, deceased, et al.,
Appellants,

vs.

THE UNITED STATES.

Los Nogales de Elias Grant.

MOTION TO ADVANCE.

The appellants by their attorney of record move the Court to advance this cause for hearing, and present the following as a brief statement of the matter involved, with the reasons for the application:

This is an appeal from the Court of Private Land Claims on the part of the claimants of the Los Nogales de Elias Mexican land grant. The grant was claimed to be a complete title in fee by metes and bounds. The case was decided below on solely one question of law, viz. (quoting from the opinion of the court on page 140 of the printed record of this case), that "at the time of the session (the Gadsden treaty of December 30, 1853), the grant had not been located within the meaning of that instrument, and hence by its express terms cannot now be recognized as of any validity. It is not such a grant as by the terms of the treaty the United States is bound to recognize and confirm, and that, under the terms of the act under which this court is constituted, is the test of the rights of the parties."

A number of grants now before the Court of Private Land Claims are similar to this one. For this reason it seems a

matter of general importance that the treaty under which the lands embraced within the Gadsden purchase were acquired should be passed on by this Court as early as practicable, so that the other cases pending may be decided according to the law as announced by this Court. The decision by this Court of this case will, it is believed, avoid the necessity of multiplying appeals.

It is a matter of pressing and general interest that these private land claims should be settled. So important is this that the Hon. Louis C. Hughes, governor of Arizona, on page 24 of his report for the year 1894 to the Secretary of the Interior, makes the following statement and recommendation:

"There is no one thing which is more devoutly prayed for by the settlers in the regions of these private land claims than an early, final settlement of title, and when it is considered that an area of more than 6,000,000 acres comprises the sum total of these claims, the interest manifested by our people may in a measure be realized. Until a final determination of title is had, the settlement and development of these vast areas of land must remain as at present, unoccupied and unproductive.

"I would therefore recommend, in the interest of claimants, homeseekers, and the Territory, an early hearing of all these cases which are or may be appealed to the Supreme Court."

The claim under this Los Nogales de Elias grant embraces 25,899.09 acres in the United States, all of which is reserved from any settlement or entry under the land laws of the United States pending the final decision of this case.

There is on this grant a city of between 750 and 1000 inhabitants, no one of whom is able to obtain any title under the land laws of the United States, and the prosperity of the city depends on the early settlement of this case.

There are on said grant not fewer than 1250 persons, no one of whom can acquire any title to his home or holding till it is determined by a decision of this Court whether these lands are the property of the United States or are owned by the grant claimants.

The Court of Private Land Claims expires by limitation

of law on December 31, 1895, only one year from the present time, and if this cause awaits its regular order on the docket of this Court it will not be reached until after the expiration of the Court below, which will thus not have the benefit, as to the other similar cases pending before it, of the views of this Court.

While this cause is believed to be of importance enough to deserve the usual time for argument, if the Court should see fit to advance its hearing and is unwilling to allow appellants two hours for argument, it may restrict the time of appellants to one hour.

Respectfully submitted,

ROCHESTER FORD,

Attorney for Appellants.

TERRITORY OF ARIZONA, } ss.
COUNTY OF PIMA. }

Ben Heney, of lawful age, being duly sworn, makes oath and says that on the 29th day of December, 1894, he served upon Hon. Richard Olney, Attorney-General of the United States, a copy of the foregoing motion by depositing a copy of said motion in the postoffice in the city of Tucson, Arizona, on the 29th day of December, 1894, securely enclosed in a postpaid envelope, and directed and sent by registered mail to said Hon. Richard Olney, Attorney-General of the United States, Washington, District of Columbia.

BEN HENEY.

Sworn to before me this 29th day of December, 1894.

W. T. GIBBON,

[SEAL.] Notary Public, Pima County,
Arizona Territory.

Office Supreme Court U. S.
FILED.
JAN 27 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

CALEB W. DURHAM,
vs.
JOHN S. SEYMOUR,
Commissioner of Patents.

Appeal from the Court of Appeals of the District of Columbia.

SUPPLEMENTAL RECORD AND BRIEF OF COMPLAINANT CONTESTING MOTION TO DISMISS.

J. NOTA McGILL,
DON M. DICKINSON,
Of Counsel for Complainant.

DETROIT:
John F. Eby & Co., Printers
1896.

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Supreme Court of the United States.

OCTOBER TERM, 1895.

CALEB W. DURHAM,
vs.
JOHN S. SEYMOUR,
Commissioner of Patents.
} Appeal.

SUPPLEMENTAL RECORD AND BRIEF CONTESTING MOTION TO DISMISS FOR WANT OF JURISDICTION.

EXTRACTS, SHOWING ALL TESTIMONY BEARING ON VALUE.

Caleb W. Durham, a witness called on behalf of the complainant above named, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to interrogatories propounded by Wm. Raimond Baird, Esq., of counsel for the complainant, testifies as follows:

1 Q. What is your name, age, residence and occupation?

A. My name is Caleb W. Durham; my age is 45 years; I reside in New York City, and I am by occupation a civil engineer, and a member of the American Society of Civil Engineers, and of the Engineers' Club of Philadelphia. I am the President of the Durham House Drainage Company of New York.

2 Q. Please state in general terms what experience you have had in your profession?

A. I was a student in the Engineering Department of the University of Michigan, from 1867 to 1869, inclusive. I have since that time followed my profession in Wisconsin, Illinois and New York, making a specialty of house sanitation. I am the inventor and manufacturer of what is known as the "Durham" system of house drainage. I have had almost twenty years constant practice in designing, manufacturing, erecting, maintaining and testing apparatus designed to secure the safe and speedy removal of sewage from houses; in fact, I have devoted my life to this work. I have superintended the erection of drainage appar-

atus in hundreds of buildings. I have written a good deal of literature on the subject, and am thoroughly familiar with the state of the art in regard to it.

* * *

14 Q. What has been the commercial effect of the decision in the Armstrong case?

A. The effect has been that Armstrong, and other plumbers in imitation of him, have caused to be made the specially designed fittings which form an integral part of my new application, and are making precisely the structure shown in the drawing attached to it, and with impunity, because the courts have decided that such an apparatus was not within the scope of the claims of my former patent. I am thus wholly without protection, and I am being deprived of my rights and of the result of the exercises of what inventive faculties I possess. The introduction of my system to the trade and to the architects of the United States has resulted in an improvement in the quality of the apparatus used for drainage purposes and its elevation to a very high plane. I have taught the public what are the essential requirements of a perfect apparatus of this nature. I have invented the apparatus which involves these requirements, have taught how it should be erected and have seen its efficiency demonstrated, and yet I am left entirely without reward because of the incompetency of the examiners of the Patent Office to understand sanitary conditions and the fact that they have not had practical experience enough to know what an enormous advance in the art has been made by the invention of my new apparatus.

15 Q. In your complaint in this suit you allege that you have been caused great injury and loss by reason of the unauthorized manufacture and sale of the apparatus made the subject of this application; please state how, and how much?

A. Since the failure of our suit against Armstrong, I have lost an incalculable amount of business. I should say that I have been deprived of not less than one hundred thousand dollars of profit on my invention. Other parties beside Armstrong are manufacturing imitations of my fittings and selling them at low prices to plumbers throughout the United States for the construction of drainage apparatus. My business in the West has been entirely taken away from me. In New York City, on the two Astor Hotels alone, the Waldorf and New Netherlands, I lost twenty-six thousand dollars. On the "Mail and Express," Mutual Life Insurance Company, Mutual Reserve Fund Life and Manhattan Life buildings, about five thousand dollars each. On many smaller jobs from one to three thousand dollars each. In all of those instances I had secured the specifying of my system of drainage, and would have secured the work at prices yielding the above-named profit if sundry plumbing firms had not

been able, by reason of the facilities offered by Armstrong and other parties manufacturing imitations of my fittings, to get the jobs away from us at lower prices than we quoted, which they are able to do because they have not had to incur the very large preliminary expense of introduction. It has cost me nearly two hundred thousand dollars and more than ten years of time to perfect my apparatus and create a market for it; and just as I began to reap some benefit from my labors and investment, the inevitable patent thief appears on the scene and appropriates calmly the whole. Armstrong has even gone to the extreme of copying and circulating as his own my price lists, with illustrations of fittings which were photo-engravings of my wood cuts, thus securing the illustrations at one-tenth their cost to me. The intelligent public have always been willing to pay me a fair price for my apparatus, but it is human nature to yield to the importunities of specious offers to furnish the "same thing" at a lower price; and many architects who know that our price is fair and our work better than the imitation provided by plumbers are unable to pursuade their clients to pay the higher price we are compelled to ask.

16 Q. Has not the loss and damage you refer to been a loss of the Durham House Drainage Company of New York, and not your individual loss?

A. By no means. In the first place, I am the owner of more than two-thirds of the stock and bonds of the corporation, so that a loss to it is a direct injury to me. Since 1884 I have had to supply from private resources any deficiencies existing in the company's funds. In the second place, that corporation owns a license from me to do business in the States of New York, New Jersey and Pennsylvania only, and the injury caused by the infringement of my rights has been general and widespread and not confined to that territory. I sold my right under the old patent for Cleveland, O., for $3,000; the right for Boston and vicinity for $10,000; the right for Kansas City and neighborhood for $3,250, and so on, at other places. The parties purchasing such rights now claim that they are valueless by reason of my inability to protect them since the decision in the Armstrong case. The decision of the Court in that case so restricted the construction of that old patent as to completely exclude the new apparatus from its terms, and unless this new application is allowed I am entirely without protection for an invention which is admittedly new and valuable, and which has made the greatest advance in the art in modern times.

* * *

George E. Knowles; my age is 56 years; I reside at Brooklyn, N. Y.; and by occupation I am a pattern and model maker.

* * *

5 Q. Did you make the patterns from which the castings of the Durham fittings are made?

A. Yes, sir.

Q. When was this?

A. I have made all their patterns since 1884.

7 Q. At that time had there ever come to your knowledge any set of fittings in any way resembling those for which you were then required to make patterns?

A. No, sir. These patterns are radically different from the patterns made for steam fitters' castings. They provide a passage way of the same diameter as the pipes, and they are of a great variety of shapes not required by and of no use to steam fitters. I have made steam fitters' patterns for 30 years, and have never made or seen made any patterns like Durham's except one—a short time ago.

8 Q. What were the patterns to which you refer?

A. These patterns for fittings like Durham's were made for one James Armstrong, who, I believe, is a plumber in Brooklyn, and they were copied evidently from Durham's fittings. I never saw any other fittings that remotely resembled them.

* * *

Allen W. Reynolds, a witness called on behalf of the complainant above-named, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to the interrogatories propounded by William Raimond Baird, Esq., of counsel for the complainant, testifies as follows:

3 Q. Please state what opportunities you have had since 1883 for becoming acquainted with the materials used by plumbers, steam and gas fitters in their respective trades?

A. In my work as superintendent for the Company spoken of, I have had occasion to lay out, plan and superintend the erection of the house drainage apparatus manufactured by the Company in very many buildings. In these buildings, which have been erected for a large variety of purposes, I have had many opportunities for examining the materials employed by steam fitters, gas fitters and plumbers. As the materials used by our company consisted of pipes and fittings by which they were connected together, and the materials employed by plumbers and steam and gas fitters consisted also of pipes and fittings, my curiosity has naturally been excited in regard to the materials employed in these other trades, and I have taken every opportunity to examine the fittings used in such other trades and to compare them with the fittings which are used by us.

* * *

10 Q. Have you any knowledge concerning the profit resulting to the inventor from the use of his new apparatus, and of the damage incurred by him from the unauthorized use of the same by other persons?

A. I know that Mr. Durham's new apparatus is recommended by architects, and is used by them whenever their clients will

pay the increased cost for the best work. This, of course, is profitable. I know that the Company does a fair business. It has done, and has had many jobs of five thousand dollars and over each; but I also know it would have done three times the business had not the plumbers imitated the system used and infringed upon its rights without our being able to stop them. The damage resulting from infringements of Mr. Durham's apparatus is very apparent. For instance, on the "Mail and Express" Building, this company was requested by the architect to furnish to the plumbers who were bidding upon the work an estimate of the cost of putting in the Durham apparatus, and upon this estimate the bids were made for the work. The bidder who finally secured the job, however, by using an imitation of the apparatus made by Mr. Durham, has, of course, saved the profit which would have accrued to this Company. The Company's loss in this case was over five thousand dollars. In addition to this, such infringements have caused an impression to arise in the minds of architects that the system can be manufactured by anybody without interference on the part of Mr. Durham, and consequently the range of the market which he would naturally have is lessened.

* * *

It is within my own knowledge that Mr. Armstrong tried to purchase the special fittings used by us for use in that piece of work; then afterwards, being unsuccessful in this, caused the fittings to be duplicated, and used the parts so made. The apparatus has also been erected by Mr. Armstrong in the Mail and Express building, at Broadway and Fulton streets, New York city.

* * *

William B. Tuthill, a witness called on behalf of the complainant above named.

A. I was educated as an architect, under the special tutorship of Richard M. Hunt and Richard M. Upjohn, and I took special courses in various technological institutions, for instance, the Massachusetts Institute of Technology, at Boston. I have been engaged in the active practice of my profession since September, 1876, in New York city, and in New York city only. I have served as architect in the erection of many buildings, among others the Carnegie Music Hall, 57th street and Seventh avenue, the Post-Graduate Medical Schooi and Hospital, now being completed at 20th street and Second avenue, and many residences, for instance, the residence of Mr. Andrew Carnegie, 5 West 51st street. I have also done much work outside of the city, including that upon several large hotels and churches which it would be tedious to enumerate.

These differences between the old and the new apparatus are such as are not likely to be perceived by an unskilled observer until they are pointed out by a person having experience with previous devices and understanding thoroughly the purpose and function of the new apparatus itself. It has been my experience that when it is explained to a client that the apparatus which will be put into a building by a plumber will cost, say, $500.00, and an apparatus made under the Durham system to accomplish a similar purpose, for the same place, will cost, say, $650.00, that he does not at first stand ready to pay the difference, but when the perfection of the new apparatus is explained to him, and the thoroughness with which its work is done, as compared with that of the average apparatus, he is usually ready to pay the increased cost. This was the case with the apparatus which is now being erected in the Post-Graduate Hospital and Medical School in this city. * * * * * *

9 Q. Have you any knowledge or information as to how extensive a use has been secured for this new apparatus?

A. I know that the most careful architects at the present time are specifying and using the Durham system for all houses where the owners will permit the additional expenditure of the sum of money required for its erection.

* * * *

A. George E. Waring, Jr.; sixty years; Newport, Rhode Island; civil engineer.

2 Q. Please state what experience, if any, you have had in relation to the designing, construction or examination of devices for the drainage of buildings, also what opportunities you have had to gain knowledge and experience in matters of house drainage and sanitary science?

A. I have given my attention to sanitary drainage for more than twenty-five years; for nearly twenty years this has been my principal occupation. I have devised many new appliances for the drainage of houses. I have made it my business to study the state of the art constantly. I have written much about it, notably in the Atlantic Monthly and the old Scribner Magazine, and in various books, and I have had charge of the drainage of important buildings. I have just finished the work of renewing the entire interior drainage of the United States Capitol at Washington, for which I made the recommendations and plans in the spring of 1892, and on which actual work under my direction was begun in August, 1892. In this work the whole system of waste soil pipes was carried out on the Durham method.

* * * *

I can illustrate my meaning by reference to the work recently done in the United States Capitol at Washington, where the system described in the present application was applied throughout.

That work could not have been done in accordance with the specifications of the patent of 235,754, (1880) for the reason that the methods therein described were in no wise suitable to the work to be done. The described method of support could not have been used, the fittings shown and described would not have answered the purpose, and I have no idea that had I only the description of the former patent before me I should or could have constructed in this work the system that was actually carried out.

* * * * * *

19 Q. Is there any information in that case that would show that the fittings employed by Mr. Armstrong were identical with those mentioned in Durham's application?

A. Yes, sir, and Mr. Armstrong testified that he could not purchase the fittings except from Mr. Durham's Company who would not sell them to him and accordingly he had them made especially for the purpose. This goes to show the novelty of the fittings.

20 Q. Why would not Mr. Durham's old patent afford him protection against the alleged infringement of Mr. Armstrong in that case?

A. The claim of this old patent calls for a support for the soil pipe independent of the building. The Court in its decision held that the earth could not constitute such a support, and hence that the claim was not infringed.

21 Q. Have you any interest in the result of the litigation?

A. No, sir; none whatever.

AFFIDAVITS AS TO VALUE FILED IN COURT OF APPEALS AND IN THE TRANSCRIPT HERE.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

CALEB W. DURHAM,
vs.
JOHN S SEYMOUR,
as Commissioner of Patents.

STATE OF NEW YORK, }
County of New York. } ss

Personally appeared before me, a Notary Public, duly commissioned and acting within the State and Court, aforesaid, Caleb W. Durham, who upon oath doth depose and say, as follows, to-wit:

I am the complainant and appellant in the above entitled cause; that this is a proceeding seeking to obtain a Patent upon

an alleged invention for drainage apparatus for houses and other buildings.

That the application in the Patent Office was originally made in 1885, and that the said apparatus has since that time been extensively manufactured and sold under the direction of deponent and has proven to be of great commercial value, that a large amount of capital is and has been invested by me in establishing the plant necessary to manufacture and put on the market my said invention, at least equal to $30,000; that the value of said invention and hence of the matter in dispute, exclusive of costs incident to this litigation, is at least equal to $100,000.

That in anticipation of receiving a proper patent upon my said invention I have from time to time since the year 1885, issued licenses to sundry persons to use my said invention in certain territory therein specified, as follows: For Denver, Colorado, and the Pacific Coast, $10,000: for Kansas and Western Missouri, $1,625.

That by reason of my failure to secure a proper patent upon said invention and the fact that therefore an imitation of it could be used by unscrupulous persons, I have lost, to my knowledge, the following direct profits: In the erection of apparatus on the two Astor Hotels in New York City, $26,000; on the Mail and Express, Mutual Life, Mutual Reserve Fund Life, and Manhattan Life buildings in New York City, $5,000 each. In all of these cases my apparatus was specified, and the work would have been given to me at the profit as above stated, if the imitators had not been able to substantially fulfill the specifications without danger to themselves by reason of my failure to secure a proper patent.

Deponent further states that the value placed on said invention or matter in dispute in this litigation is therefore far in excess of $5,000, exclusive of all costs.

Sworn to before me this 19th day of July, 1895.

CALEB W. DURHAM.

MAX JUST, Notary Public, N. Y. Co.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

CALEB W. DURHAM,
vs.
JOHN S SEYMOUR, as Commissioner of Patents.

STATE OF NEW YORK, County of New York. } ss

Personally appeared before me, a Notary Public, duly commissioned and acting within the State and Court, aforesaid, Allan W. Reynolds, who upon oath doth depose and say, as follows, to-wit:

I am a plumber by occupation, and my age is thirty-five years. I was in the employ of the Durham House Drainage Company, of New York, from 1883 to 1894, and during most of that time was engaged in the construction and erection of the invention which is the subject matter of this litigation, as superintendent for the said Company. In my opinion the invention, and hence the matter in dispute in this litigation, is worth at least $100,000, and is largely in excess of $5,000 exclusive of all costs.

The amount of capital invested in the plant necessary to manufacture and put on the market this said invention was at least equal to $30,000.

By reason of Mr. Durham's failure to secure a proper patent upon his said invention, and the fact that in many cases where his invention was specified, unscrupulous infringers could technically satisfy the specifications by erecting an imitation of his apparatus, there was a direct loss of profit upon the following jobs, for which Mr. Durham's invention had been specified, viz: The erection of the apparatus on the Mail and Express building, the Mutual Reserve Fund Life building, and the Manhattan Life building, all in New York City, of $5,000 each.

Deponent further states that the value placed on said invention or matter in dispute in this litigation is therefore far in excess of $5,000, exclusive of all costs.

Sworn to before me this 19th day of July, 1895.

ALLAN W. REYNOLDS.

MAX JUST, Notary Public, N. Y. Co.

Both affidavits filed in the Court of Appeals July 20, 1895.

BRIEF.

This bill was filed under the following Section of the Revised Statutes:

"§ 4915. Whenever a patent on application is refused, either "by the Commisioner of Patents *or by the Supreme Court of the "District of Columbia upon appeal from the Commissioner*, the "applicant may have remedy by bill in equity; and the Court "having cognizance thereof, on notice to adverse parties and "other due proceedings had, may adjudge that such applicant is "entitled, according to law, to receive a patent for his invention, "as specified in his claim, or for any part thereof, as the facts in "the case may appear. And such adjudication, if it be in favor of "the right of the applicant, shall authorize the Commissioner to "issue such patent on the applicant filing in the Patent Office a "copy of the adjudication, and otherwise complying with the re-"quirements of law. In all cases, where there is no opposing "party, a copy of the bill shall be served on the Commissioner; "and all the expenses of the proceeding shall be paid by the ap-"plicant, whether the final decision is in his favor or not."

We come here under Section 8 of the Act of Congress of February 9, 1893, creating the Court of Appeals for the District of Columbia, which reads as follows:

"That any final judgment or decree of the said Court of Ap-"peals may be re-examined and affirmed, reversed or modified "by the Supreme Court of the United States, upon writ of error "or appeal, in all cases in which the matter in dispute, exclusive "of costs, shall exceed the sum of $5,000, *in the same manner "and under the same regulations as heretofore provided for in "cases of writs of error on judgment or appeals from decrees ren-"dered in the Supreme Court of the District of Columbia;* and "also in cases, without regard to the sum or value of the matter "in dispute, wherein is involved the validity of any patent or "copyright, or in which is drawn in question the validity of a "treaty or statute of or an authority exercised under the United "States."

Section 846 of the Revised Statutes for the District of Columbia provided for appeals from the Supreme Court of the District of Columbia "In the same cases and in like manner as provided by "law in reference to final judgments, orders and decrees to the "*Circuit Court of the United States.*"

By the Act of March 3, 1885, it is provided:

"That no appeal or writ of error shall hereafter be allowed from "any judgment or decree in any suit of law or in equity in the "Supreme Court of the District of Columbia, or in the Supreme "court of any of the Territories in the United States, unless the "matter in dispute, exclusive of costs, shall exceed the sum of five "thousand dollars." Section 2 provided:

"That the preceding section shall not apply to any case where-
"in is involved the validity of any patent or copyright."

And so the limitation by value upon appeals and writs of error to the Federal *Circuit Courts* is provided by R. S. 699 not to apply to "any case touching patent rights or copyrights."

It will be observed that the District of Columbia Court of Appeals Act of February 9, 1893, provides for an appeal with precisely the same limitations "provided for in cases of writs of error "on judgments or appeals from decrees rendered in the Supreme "Court of the District of Columbia" (and appeals from the latter were in turn governed, as before seen, by the law regulating appeals from the Federal Circuit Courts to this court. The exception from the limitation as to value is in identical language in the Supreme Court Act (March 3, 1885), and in the Court of Appeals Act (February 9, 1893), to wit:—Shall not apply to any case "*wherein is involved the validity of any patent or copyright.*"*

In this state of the statutes, this Court has repeatedly heard and determined appeals in cases brought under Section 4915, as the present case is, both from the Supreme Court of the District of Columbia and from the Circuit Courts of the United States; and this, too, both before and after the Act of March 3, 1885; as for example in the following cases:

Morgan vs. Daniels, 153 U. S., 120 (Circuit appeal).
Hill vs. Wooster, 132 U. S., 693.
Gandy vs. Marble, 122 U. S., 432 (District appeal).

Butterworth vs. Hoe, 112 U. S., 50, was a Supreme Court of the District of Columbia case, but appealed prior to the Act of 1885.

But whether before or after the Act of 1885, it is apparent that in no case brought under Section 4915 can it be alleged that any "patent right" actually exists, for the simple reason that it is itself a proceeding to obtain a patent.

We submit that if there is no jurisdiction here there was no jurisdiction in the above cases, and some of them are judgments of reversal.

MANIFEST JURISDICTION BY VALUATION.

The complainant obtained letters patent for a drainage apparatus on December 21, 1880, (not 1890, as misprinted in defendant's motion record, paragraph 5, page 6.)

He subsequently made improvements on the system, which as shown by his proofs created a *new system of drainage* as an entity. For this he applied for this pending patent.

In the meantime one Armstrong applied for, and being refused, secured models of the parts of the new system (this Record, pp.

*Jurisdiction in the District Court of Appeals Act is not restricted as in the Circuit Court of Appeals Act of 1891; on the contrary, the jurisdiction in the former is left as before.

3, 4, 5, 7, and bill and answer, Defendant's Record, pp. 6, 9, par. 5), and proceeded to use and erect them in his business

As he had then no patent on the new system, complainant sought to restrain the use of certain parts under the old patent of 1880, in the Circuit Court for the Southern District of New York.

That Court held that Armstrong's system as a whole (appropriating the new system of Durham) was not an infringement of the patent of 1880. (Bill, Defendant's Motion Record, p. 7—Durham vs. Armstrong, 36 F. R., 596.)

The Supreme Court of the District in this suit on the other hand held that the patent of 1880 did cover the new system, and therefore held the complainant not entitled to a patent (Defendant's Motion, Record, pp. 10 to 19).

But the Court of Appeals affirmed the rejection on a new ground, i. e., want of novelty. "Notwithstanding, the labor and "industry of the Complainant have produced a structure of great "usefulness" (Defendant's Record, pp. 19, 55).

On the testimony here printed there is no question that his system here in question went into immediate and general use, and so superior was it that it excluded every other system or method in all public and private structures of importance (and see Court of Appeals, p. 37, Defendant's Motion Record).

Durham's system furnished by him was put in this Capitol, where your honors sit by Waring. (This Record, p. 6, 7).

The great commercial value of the system generally is beyond question on the testimony.

Allegations of great value, and of great pecuniary loss, are made in the original bill (par. 4, and last clause par 5), and not denied in the answer.

It cannot be true as claimed that it is not competent to allege and prove the facts on which our ultimate appeal to this Court may depend.

Have we, then, shown that the "estimable value" is over $5,000?

Premising that the new Durham process was in general use:

In the first place, the witness Tuthill (pp. 5, 6, this record) testifies that Durham's system brought thirty per cent more than others.

Reynolds (pp.4, 5, this record) testifies that the Durham Company had many jobs of over $5,000, and knew of three times the business lost but for imitations and infringements. The clear loss in the Mail and Express work alone was $5,000.

Durham testifies to at least a loss of $100,000, and gives details. (This Record, p. 2).

He testifies that his system has cost him $200,000 to perfect.

Pending his application he sold licenses to other States under the old patent, and among others, names amounts aggregating

$16,500 which are valueless, because not protecting the new system from infringers, since the decision in Armstrong's case. (This Record, p. 3).

The affidavits (pp. 7 to 9) are conclusive, and are competent on this question of value.

Carr vs. Fife, 156 U. S., 494, was a proceeding in equity to have the defendant declared a trustee for the benefit of the complainant on the ground that a patent for lands had been improperly issued to the defendant.

This court held that evidence and ex parte affidavits were competent on the question of value in the following language :

" The suit was not one to recover a sum of money, but to decide " a question of title to a considerable tract of land, and the plaintiff " put in evidence in support of his claim, and, of course, before the " decree was entered, tending to show that the land was worth " more than ten thousand dollars ; and if it be competent, as has " always been held, to show by *ex parte* affidavits the amount of " the value of the matter in dispute, it would seem that evidence " to the same effect, deliberately put in by the very party now sug- " gesting the defect, should be regarded as sufficient."

and to some point

Whiteside vs. Hazelton, 110 U. S., 296.
Street vs. Ferry, 119 U. S., 385.
Williamson vs. Kinkaid, 4 Dallas, 20.
Conner vs. Stead, Id., 22.

The testimony and affidavits as to the labor, and the cost of the plant, in conection with the showing as to the general demand and use of the system, are competent in estimating value. Such evidence is analogous to testimony as to the actual cost of improvements on real estate, which is held competent in estimating the " value of the matter in dispute," for the purpose of establishing this jurisdiction.

Miss. R. R. vs. Ward, 2 Black, 485.
Market vs. Hoffman, 101 U. S., 112.

THIS SUIT IS ESSENTIALLY TO GAIN A RIGHT OF ESTIMABLE PECUNIARY VALUE AND PRESUPPOSES VALUABLE PROPERTY RIGHT IN THE COMPLAINANT, WHICH HE SEEKS TO MAKE AVAILABLE FOR PECUNIARY PROFIT.

The very theory of the patent laws is that the inventor shall have a return in money for the creation of his labor and money. It is not true as claimed that the inventor before patent has no property in his conception.

On the contrary this Court has held that an invention before patent *is* property, which may be sold, contracted for, and must be paid for if " taken" without compensation.

In Gaylor vs. Wilder, 10 How., 477, 493.

The inventor sold for $5,000 an invention called a Salamander

Safe for which he had not applied for a patent, but was "about" to so apply. No patent was granted for three years thereafter.

The Court by CHIEF JUSTICE TANEY, in delivering the opinion, said:

"The inventor of a new and useful improvement certainly has "no exclusive right to it, until he obtains a patent. This right is "created by the patent, and no suit can be maintained by the in- "ventor against any one for using it before the patent is issued. "But the discoverer of a new and useful improvement is vested "by law with an inchoate right to its exclusive use, which he may "perfect and make absolute by proceeding in the manner which "*But the discoverer of a new and useful improvement is vested* "*by law with an inchoate right to its exclusive use, which he may* "*perfect and make absolute by proceeding in the manner which* "*the law requires.* Fitzgerald possessed this inchoate right at "the time of the assignment, the discovery had been made, and "the specification prepared to obtain a patent. *And it appears* "*by the language of the assignment, that it was intended to oper-* "*ate upon the perfect legal title which Fitzgerald then had a law-* "*ful right to obtain, as well as upon the imperfect and inchoate* "*interest which he actually possessed. The assignment requests* "*that the patent may issue to the assignee.* And there would "seem to be no sound reason for defeating the intention of the "parties by restraining the assignment to the latter interest, and "compelling them to execute another transfer, unless the Act of "Congress makes it necessary. The court thinks it does not."

In U. S. vs. Palmer, 128 U. S., p. 271, this Court (Mr. Justice Bradley) said:

"It has been the general practice when inventions have been "made, which are desirable for Government use, either for the "*Government to purchase them from the inventors*, and use them "as secrets of the proper department; *or if a patent is granted to* "pay the patentee a fair compensation for their use."

Marsh vs. Nichols, 128 U. S., 605, cited by counsel, does *not* hold that there is no property right in the inventor before patent. That was a suit in form on a patent, which was defective because not signed by the Secretary of the Interior. But the court in the opinion quoted with approval Taylor vs. Wilder, *supra*, but said: "Until the patent is issued there is no property right in it, "*that is, no such right as the inventor can enforce.*"

Of course, there was not any property right *in the patent* in that case, and the court carefully qualified the statement in the chief proposition so as not to be understood as saying that there is no property right in *the invention.*

That the right can be assigned see also

Clum vs. Brewer, 2 Curt., 506.
Wright vs. Randall, 19 Blatchf., 495.
Rathbun vs. Orr, 5 McLean, 131.
Gay vs. Cornell, 1 Blatch., 506.

It may be made the subject of contract, and will be protected against those who, in breach of confidence, undertake to convert it to their own use or betray it.

Peabody vs. Norfolk, 98 Mass., 452.
Solomon vs. Hertz, 35 Pat. Off. Gaz., 1109.

It cannot be doubted that any fraud or tort through which an inventor should be prevented from applying for or from obtaining a patent, would be actionable; and by the amount of the claim for damages in such a case would the jurisdiction for appeal to this Court, from a federal court, be tested.

The right to a patent, by which the inventor's inchoate property is made available for his profit, by law, is an absolute one, of which no one can deprive him, if he brings himself and his invention within the statutory and legal definitions of inventor and invention.

As said by *Justice Bradley in U. S. vs. Palmer, supra:* "The "grantee (patentee) is entitled to it (the patent) as a matter of "right, and does not receive it, as was originally supposed to be "the case in England, as a matter of grace and favor."

Now as shown by *Gandy vs. Marble, 122 U. S., pp. 432-439,* and other cases cited supra under § 4915, this proceeding is a plenary original equity suit, asserting a right to a valuable thing, and averring that that right is wrongfully denied the complainant.

It is like the case of a bill for the specific performance of a land contract, or to declare a trust in hand.

The complainant alleges no title, but sets up a mere equity. In such cases jurisdiction for appeal is determined by the value of the land.

In those cases the complainant claims rights under contract express or implied. In this case we claim a defined right under the statute. In neither case is value set up as an essential allegation below, but in all, it may be shown, to secure the appellate jurisdiction, by evidence or by affidavit. Affidavits may be filed here or below. If filed below they come here as part of the record, and they are so here (Foster Fed. Pr., § 395).

There is no contradiction of the claim of value made by complainant. Counsel is mistaken when he says that Armstrong contradicts it, and if he did the great preponderance of proof is with the complainant.

We submit that the motion should be denied.

J. NOTA McGILL,
DON M. DICKINSON,
Of Counsel for Complainant.

161 U.S. 235

Office Supreme Court U. S.
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161 - 235

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

CALEB W. DURHAM, APPELLANT,
v.
JOHN S. SEYMOUR, COMMISSIONER of Patents, appellee.

At law. No. 769 of A. D. 1895.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

LEVIN H. CAMPBELL,
Counsel for the Commissioner of Patents.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

CALEB W. DURHAM, APPELLANT, v. JOHN S. SEYMOUR, COMMISSIONER of Patents, appellee.	At law. No. 769 of A. D. 1895.

COPY OF MOTION AND BRIEF OF ARGUMENT.

To Mr. DON M. DICKINSON and
Mr. J. NOTA MCGILL,
Counsel for Caleb W. Durham, appellant.
Washington, D. C.

SIRS: You will please take notice that on Monday, the 13th day of January, A. D. 1896, at the opening of the court, or as soon thereafter as counsel can be heard, a motion, of which the annexed is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon. A copy of the brief of argument which will accompany the motion is attached hereto.

LEVIN H. CAMPBELL,
Counsel for the Commissioner of Patents, Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

CALEB W. DURHAM, APPELLANT, v. JOHN S. SEYMOUR, COMMISSIONER of Patents, appellee.	At Law, No. 769 of A. D. 1895.

MOTION.

Comes now John S. Seymour, Commissioner of Patents, appellee, by his counsel, appearing specially in that behalf, and moves the court to dismiss the appeal in the above-entitled case for want of jurisdiction, because—

a. The matter in dispute in the case, exclusive of costs, does not exceed the sum of $5,000. No right of property, nor right of any kind which exceeds the sum of $5,000, or can be calculated or stated in money, being in dispute.

b. No question is presented in the case involving the validity of any patent or copyright, or treaty or statute of, or an authority exercised under the United States.

LEVIN H. CAMPBELL,
Counsel for the Commissioner of Patents, Appellee.

ACKNOWLEDGMENT OF SERVICE.

Service of a copy of the aforegoing letter of notice and motion, and of a brief of argument accompanying the same, is herewith acknowledged, on this 14th day of December, 1895.

_____ _____,

J. NOTA MCGILL,

Counsel for Caleb W. Durham, Appellant.

BRIEF OF ARGUMENT.

STATEMENT OF THE CASE.

This is a bill brought by Caleb W. Durham under the provisions of section 4915, Revised Statutes, to obtain a decree which shall authorize the Commissioner of Patents to issue a patent to him for his alleged invention in drainage apparatus for buildings.

The bill was filed in the supreme court of the District of Columbia. William E. Simonds, at that time Commissioner of Patents, was made respondent therein. He filed an answer to it, but subsequent thereto and prior to the hearing of the case Mr. John S. Seymour succeeded him as Commissioner of Patents.

The supreme court adjudged on the evidence that Durham was not entitled to a decree and dismissed the bill; whereupon Durham appealed to the court of appeals, and that court affirmed the decision of the lower court. All of which will more fully appear from copies of the

bill and answer and opinions of the supreme court and court of appeals, herein set out:

[Copy of the amended bill.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

CALEB W. DURHAM *v.* WILLIAM E. SIMONDS, AS Commissioner of Patents, Defendant.	Bill of complaint. In equity. No. 14461.

Between Caleb W. Durham, complainant, and William E. Simonds, as Commissioner of Patents, and his successors in office as such Commissioner of Patents for the time being.

To the supreme court of the District of Columbia, holding equity court:

1. Your orator respectfully represents that he is a citizen of the United States, residing in New York, in the county and State of New York, and that he brings this bill in his own right against William E. Simonds, who is sued in this action as Commissioner of Patents of the United States of America, having his official residence in the city of Washington, in the District of Columbia, in accordance with section 4915 of the Revised Statutes.

2. That he is the inventor of a certain new and improved form of drainage apparatus; that on the tenth (10th) day of January, A. D. 1885, he presented an application for a patent, filed in due form, to the Commissioner of Patents, in accordance with section 4888 of the Revised Statutes of the United States, praying that letters patent may be granted him for said invention; that after divers appeals and

rehearings said application was finally rejected by the Commissioner of Patents on the eighteenth (18th) day of January, 1892; that thereupon your orator, on the 26th day of April, 1892, filed an appeal to the supreme court of the District of Columbia, in general term; that said cause was heard on the first day of June, 1892, and on the 13th day of June, 1892, the said court affirmed the decision of the Commissioner of Patents; all of which will appear from duly certified copies of such application and proceedings, in court to be produced.

3. Your orator says he verily believes that he is entitled to letters patent for said invention, by bill in equity, by virtue of the statute made and provided; that said invention was not known or used by others in this country, and not patented or disclosed in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor.

4. Your orator further says that his invention is one of great commercial value; that it has been placed upon the market by your orator and has gone into general use; that its novelty, superiority, and value is generally recognized by architects and experts in sanitary engineering, and it is conceded by such experts that it constitutes a great advance in the art to which it appertains.

5. The main ground for rejection of your orator's application for letters patent has been that the drainage apparatus and combination of mechanical elements described in the claims attached to and made part of said application, as required by law, is substantially the same as are described and claimed in a previous patent granted to your orator December

21st, 1890, No. 235754; that the said apparatus and mechanical elements differ substantially and materially from the apparatus claimed in said patent, and that said differences constitute an invention and are so recognized by sanitary experts and others skilled in the art to which the said invention appertains; that previous to November, 1888, one James Armstrong made an apparatus embodying the mechanical features claimed in your orator's application, that he was thereupon sued for infringement of said Letters Patent No. 235754, and that the U. S. circuit court for the southern district of New York held in said suit, on or about November 19th, 1888, that the said device was not included within the scope of the claims of said patent.

That sundry persons are now making the device sought to be patented in your orator's application, and are deriving large profits therefrom and are causing your orator great injury thereby, and that, notwithstanding the novelty and value of your orator's invention, he is wholly without protection and is being deprived of his rights and is suffering irreparable injury therefrom.

6. Wherefore your orator complains and prays that the said adverse decision may be reversed, and that this court order that he be adjudged and declared entitled to letters patent for his invention, as set forth in said application, or of such part or parts thereof as, upon due consideration, may be found patentable, and to this end may it please your honors to grant a writ of subpœna of the United States of America directed to the said William E. Simonds, as Commissioner of Patents, and his successors in office as such Commissioner of Patents for the time being, commanding him on a day certain to appear and answer this bill of complaint,

and to stand by and perform such order and decree in the premises as to the court shall seem proper, and that he be authorized to issue letters patent for said invention in accordance with the decision of your honors, and for such other and further relief in the premises as the facts in the case require and your honors may deem meet, and your orator shall ever pray, etc.

(Signed) CALEB W. DURHAM.

STATE OF NEW YORK,
New York County, ss:

On this 4th day of January, 1893, before me personally appeared Caleb W. Durham, the above-subscribed complainant, who, being duly sworn, says that he is the inventor of the new improvements set forth in the foregoing bill; that he has read the same; that he knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to these matters he believes them to be true.

Sworn to and subscribed before me this 4th day of January, 1893.

[SEAL.] (Signed) GEO. SEAMAN,
Notary Public.

[Copy of the answer.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

CALEB W. DURHAM
v.
WILLIAM E. SIMONDS, Commissioner of Patents.
} Answer. In equity. No. 14461.

To the supreme court of the District of Columbia, sitting in equity, comes the respondent in the above-

entitled case, William E. Simonds, Commissioner of Patents, and makes answer to the complainant's bill therein as stated:

1. He admits the allegations of the complainant's paragraph 1.

2. He admits the allegations of complainant's paragraph 2, as to the filing of an application in the Patent Office by the said complainant and the subsequent proceedings thereon in the Patent Office and in this court, all of which more fully appears of record in said case on file. He denies the allegation of the complainant that the complainant is the inventor of the subject-matter thereof.

3. All the allegations contained in the complainant's paragraph 3 this respondent denies.

4. As to the matters alleged in complainant's paragraph 4, this respondent has not sufficient knowledge upon which to base a belief, and he puts the complainant to the proof thereof.

5. As to the matters contained in complainant's paragraph 5, this respondent admits the allegation that complainant's application was rejected mainly because it was for substantially the same invention as that for which a previous patent had been granted to the same applicant, to wit, letters patent No. 235754, December 21st, 1880. He denies the allegation that the apparatus and mechanical elements covered by the rejected application differ materially and substantially from the apparatus and mechanical elements covered by said prior patent. As to the other allegations of this paragraph, respondent avers that he has not sufficient knowledge upon which to base a belief, and he puts complainant to the proof thereof.

6. In further answer to complainant's said bill, respondent avers that complainant's application does

not disclose an invention which is patentable within the meaning of the law, in view of the state of the art at the time said application was filed, as fully disclosed by the record of complainant's case now on file.

Wherefore respondent prays that complainant's said bill be dismissed for want of equity.

WM. E. SIMONDS,
Commissioner of Patents, Respondent.

[Copy of the decisions of the Supreme Court of the District of Columbia.]

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

DURHAM
v.
SIMONDS, AS COMMISSIONER OF PATENTS.

Decided October 9, 1894.

COX, *J.:*

This bill is filed to obtain a decree requiring the Commissioner of Patents to issue a patent to the complainant for a certain new and improved form of drainage apparatus, which is described in the proceedings.

The complainant had made application for a patent in January, 1885, to the Patent Office. The Primary Examiner having decided adversely to him, he appealed to the Examiners-in-Chief, and from them to the Commissioner, and from his affirmance of the action of the Examiners he appealed to the Supreme Court of the District of Columbia, and, that court having affirmed the Commissioner, he has brought this suit under authority of section 4915 of the Revised Statutes.

A preliminary question is suggested as to the extent of the relief that could be granted in this form of proceeding.

In the course of the proceedings in the Patent Office the claims of complainant underwent many modifications. They were sometimes canceled, sometimes amended, increased, and again reduced in number, having been at one time as many as twenty-four, then reduced to seven and finally to three. The last appeal to the Commissioner, and from him to this Court, related only to three claims.

But the complainant insists that in this suit he may set up and ask an adjudication upon any and all of the claims presented by him from time to time to the Commissioner, although afterward withdrawn or rejected. Section 4915 provides that whenever a patent is refused either by the Commissioner of Patents or by the Supreme Court of the District of Columbia, upon appeal from the Commissioner, the applicant may have his remedy by bill in equity.

It is evident that the jurisdiction of this Court to proceed in an original suit, like the present, can only arise in case of refusal of an application by the Commissioner or by this Court on appeal from him.

The last step taken by the complainant in the Patent Office before the final rejection of his application there was to state, in a petition for a rehearing—

"that the claims now standing in this and heretofore passed upon do not accurately set up the true invention,"

and that—

"your petitioner having recognized the force of the objections urged, etc., has drawn other and more specific claims,"

which—

"he would want to be those upon which appeal would be taken and final decision had,"

and which he requested "should be entered in lieu of those now standing." This was allowed, and the

three claims were those which, upon rejection by the Commissioner, were appealed to this Court.

This action of the complainant would seem clearly to be a waiver of the then pending claims and of any right to correct the adverse action of the Commissioner upon them in any form. They are as completely out of the case as if they had never been before the Commissioner. To attempt to revive them here would be like attempting to revise adverse action in a suit which the plaintiff had voluntarily dismissed. Besides this, when the Commissioner refused his application the complainant had his election between bringing his suit in this Court, in equity, and prosecuting his appeal from the Commissioner and only bringing his suit upon the failure of his appeal. As he chose the latter course, I take it that the action of this Court upon the appeal is to be considered as the termination of the Office proceedings and that such action and not the previous decision of the Commissioner is to be considered as determining the jurisdiction in the present suit; and as the claims, other than the three before referred to, never went before this Court on the appeal the condition of jurisdiction as to them fails.

My conclusion therefore is that in the present case I am confined to the consideration of the three claims which were finally presented to the Commissioner and then, on appeal, to this Court.

I come now to the merits of these claims, but am only able to state what seem to me to be the general results of the evidence and not to review it in detail.

The complainant's application was rejected by the Office principally upon a reference to a patent issued to him in December, 1880, for an invention claimed by the Office to be substantially identical with that for which he now asks a patent. If there is any

difference, it is said to be no more than what would suggest itself to one familiar with that patent and skilled in the art to which the invention relates, and it is not one which called into exercise the inventive faculty which the law encourages and rewards. If this be so, the complainant is not entitled to a patent which would, in effect, prolong his monopoly beyond the period contemplated by the law.

The patent of 1880 was for an improvement in drainage apparatus for houses and other buildings. It may be here described, generally, as consisting of an upright soil-pipe, in sections, connected below, by an elbow, with a horizontal or slightly-inclined drain-pipe and having branch pipes in the different stories to connect with water-closets and other fixtures, together with a running-trap or water seal in the drain-pipe and a ventilating air-shaft.

The device now claimed as patentable is also a drainage apparatus of the same general character as the other; but the complainant insists that it embodies patentable novelties.

The complainant says in his testimony that the device secured to him by his patent of 1880 consisted of a main drain of iron pipe, with the several sections united by bolts passing through flanges, and on this drain as a foundation the soil-pipe was erected. He proceeds to show that this mode of connecting the pipes was not received with favor by engineers, and he abandoned it and used for the drain cast-iron pipe with lead joints. In 1884, while he was constructing an apparatus for a customer having a drain-pipe of only six or seven feet in length, with leaded joints, which could be completed in the shop, all the rest of the work being screw-jointed, it flashed across his mind that if he made a trap (like B in the drawings) with screw-joints and used wrought-iron instead

of cast-iron for the drain his device would be far more practicable and less expensive. It would be both, because lead joints had generally to be made at the buildings where the apparatus was to be used and by skilled workmen, whereas any ordinary workman with a wrench can screw together pipes with threaded ends. On the question of the exercise of the inventive faculty this sudden conception is exactly what he claims as the act of invention, and the invention as thus far detailed seems to consist in the substitution of wrought-iron pipes, with screw-joints, in the drain-pipe and the running-trap connections in the place of the flanged or leaded joints theretofore used.

The invention as an entirety is described in the first claim as a—

"drainage apparatus for buildings and the like, consisting of a drain-pipe, and vertical soil-pipe and branch pipes, all of wrought metal, and having cast fittings, said pipes being united by screw-threaded joints, and forming, when screwed together, a rigid and continuous structure, which will remain intact throughout its length, being supported by some part of the building, as the conditions thereof may require."

It may be remarked in passing that one advantage claimed in the specification of the patent of 1880 for the apparatus therein described was that it might rest on supports in the earth independent of the building. That is not mentioned in the present application; but it is evident that exactly the same advantage can be claimed for the new device. That which, in fact, is claimed for it is that it may also be supported on some part of the building.

The device now presented may have all the advantages claimed for it. If so, they all seem to result

from the one feature of screw-joints adopted for the pipes and fittings, and that seems to be the very essence of the alleged invention.

The important question is whether that is a novelty or was already covered by the patent of 1880 and was disclosed by the specifications and drawings accompanying it.

In the specification of that patent it is said:

"This waste-pipe may be made either of wrought or cast iron pipe and the different sections should be joined together with some kind of close or tight joint, in order to prevent any leakage or escape of gases."

At that time it is evident that flange-joints, leaded joints, and screw-joints were all well known as means of connecting sections of pipes, and it could hardly be said that any one of them was not embraced in this language of the specification, even if it had stopped here; but the next sentence is:

"If wrought-iron pipe is used (*i. e.*, in the drain) the different sections or nipples are united with the ordinary screw or steam-fitting joint."

Again, with reference to the running-trap located in the drain, it is said:

"The ends of the trap are provided with flanges for the purpose of making a flanged joint with sections of the drain-pipe. The trap may, however, be provided with means for forming other suitable kinds of joints than flanged joints."

Of course this would include screw-joints, and the complainant in his testimony says:

"And while I did not altogether use screw-joints in that patent, I was aware that pipes and fittings might be so united and could probably produce a structure more nearly gas tight than one formed by adjacent flanges."

The screw-joint was well known as a means of uniting pipes for steam or drainage. In the device of 1880 all the sections of the vertical pipe were so united. So were the branch pipes united to the soil-pipe, and this last was united with the drain-pipe by being screwed into an elbow, so that the screw-joint was a prominent element in the device; and it would seem so natural to extend it to the drain-pipe and trap, if that were not already provided for in the patent, as to exclude the idea of invention; but, as we have seen, the specifications expressly provide for this very thing, and the patent of 1880 discloses and covers the drain as well as the soil pipe, of wrought-iron, and the running-trap, all united with screw-joints.

And yet we remember that what the complainant claims as his act of invention, entitling him to a patent, was the sudden conception of the utility of making the trap with screw-joints and using wrought-iron instead of cast-iron for the drain-pipe.

It may be, and there are some indications to that effect, that in his references to the screw-joints the complainant had in mind only the prevention of the leakage or the escape of gas; but it cannot be said for that reason that the patent only authorized their use for that purpose. If they are described as a part of the device or as one of the several forms of it, they are a part of it for all purposes.

Does the supposed invention consist of anything more than the discovery that one of several forms of construction, all equally covered by the patent, is more useful than others and useful for other purposes or in other respects than were in the mind of the inventor?

After sundry experiments the complainant found that a screw-joint, which he may have first thought

of only as a preventive of leakage, is preferable to others on other grounds also, because it gives rigidity to the structure, because the device so constructed can be sent to customers anywhere and put up by unskilled workmen, can be made in interchangeable parts and supported in any part of the building, etc.; but, after all, is not the same device covered by the patent of 1880? It seems to me that the patentee is bound to know the capabilities of his invention in the outset and that it is not invention to discover afterward that "he builded wiser than he knew" and that a feature in his invention which he valued for one purpose is also useful for another.

I therefore think that the complainant's invention now presented in his first claim is substantially the same as the former one and is protected by his patent of 1880, and the case falls within the rule laid down by the Supreme Court in *Miller* v. *Manufacturing Co.*, (66 O. G., 845; 151 U. S., 186,) in which that Court says:

"The result of the foregoing and other authorities is, that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ."

The second claim:

"2. As an improvement in drainage apparatus having an inclined drain-pipe and composed of a series of threaded interchangeable parts, the running-trap B herein described, provided with two inclined parallel threaded openings to receive the threaded ends of inclined sections of said drain-pipe, and two similar vertical openings in the top of the trap, one to receive a perpendicular air-inlet pipe, and the other for use as a hand-hole."

I understand this claim to be simply for the trap, to be used in connection with the drain-pipe described. A running-trap with parallel openings to connect with the sections of the pipe, with two hand-holes, with screw-plugs and threaded or other joints with the drain-pipe, is provided for in the patent of 1880. The only difference is that in the patent the openings are not vertical and one of them could not be used to receive a perpendicular air-pipe. There is no claim for the air-pipe, but simply for the trap with openings, one of which can be used for the perpendicular air-pipe.

The evidence does not show any superior utility in a perpendicular over an inclined air pipe, and even if that be conceded I cannot see any patentable invention in merely changing the inclined into a vertical opening to accommodate it to the upright pipe; but, besides, there does not seem to be any novelty in the form of this trap, as it appears substantially the same in several other patents which have been referred to.

Sargent, in his patent of January, 1878, has the vertical opening so near as to be practically in his trap, with the perpendicular pipe leading to the outer air, as in this application. Knight, in his patent of March, 1878, has two vertical openings in his trap capable of the same use as those of Durham. Pike, in his patent of December, 1884, has similar openings and pipe. So has Hornbrook in his British patent of 1877.

As I understand this claim, then, it does not seem to me to present features of patentable novelty and utility.

Third claim:

"3. As an improvement in drainage apparatus composed of a series of parts united by screw-threaded joints, the inclined threaded branch pipe, the cast fitting (F in the specification and drawing)

having an inclined threaded opening to receive the threaded end of the said branch pipe at a rising grade, and a second larger threaded opening at its upper end, and the separable screw-neck flange (F′) threaded on its external surface and entering said enlarged end of said fitting."

In the patent of 1880 I find a branch pipe with threaded end and a water-closet fitting receiving the end of the branch pipe, made in the form of an elbow, as in the present application, with a top or flange with screw or bolt holes for the purpose of securing the base of the water-closet to it. Then it is said that the branch pipe would be inclined from a horizontal position.

The only differences seem to be that in the present device the opening at the upper end is larger and that the flange for receiving and having screwed to it the base of the water-closet is a separate piece to be screwed into the fitting instead of being cast on it.

I am unable to see that these are patentable improvements, if, indeed, they are new.

If this claim is worth considering apart from the others, I am quite willing to be enlightened upon it.

[Copy of the decision of the Court of Appeals of the District of Columbia.]

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

DURHAM
v.
SEYMOUR, COMMISSIONER OF PATENTS.

Decided April 1, 1895.

SHEPARD, *J.:*

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing an

appeal filed by complainant January 11, 1893, against the Commissioner of Patents under the authority of section 4915, Revised Statutes, to compel the issuance of a patent for an improved drainage apparatus for buildings.

The proceeding to obtain a patent for the alleged invention was begun by filing an application in the Patent Office January 10, 1885, in which the following claims were made:

"1. A drainage apparatus for buildings, consisting of pipes and fittings secured together by screw-joints, substantially as and for the purposes specified.

"2. Water-closet fittings which terminate in an adjustable screw-neck flange for the attachment of the hopper substantially as and for the purpose specified.

"3. The combination, substantially as before set forth of the soil pipe, the flashing, and the tapped collar."

This application was amended February 8, 1887, and the claims of the invention were increased in number to twenty-four.

The proceedings in the Patent Office show repeated rejection and amendments of claims until, reduced to seven, they were rejected by the Primary Examiner. An appeal was taken from his decision to the Examiners-in-Chief, who affirmed it November 9, 1889. This was in turn affirmed on appeal to the Commissioner April 29, 1890. Applicant then presented a motion for rehearing in order to again amend his claims before the Primary Examiner. This was granted, and the application was amended so as to show, three claims as follows:

"1. The herein-described drainage apparatus for buildings and the like, consisting of a drain-pipe, a

vertical soil-pipe, and branch pipes, all of wrought metal and having cast fittings, said parts being united by screw-threaded joints and forming, when screwed together, a rigid and continuous structure which will remain intact throughout its entire length, being supported from some part of the building as the conditions thereof may require.

"2. As an improvement in drainage apparatus having an inclined drain-pipe and composed of a series of threaded interchangeable parts, the running trap B herein described, provided with two inclined parallel threaded openings as *b'*, to receive the threaded ends of inclined sections of said drain-pipe, and two similar vertical openings in the top of the trap, one to receive a perpendicular air-inlet pipe and the other for use as a hand-hole, as set forth.

"3. As an improvement in drainage apparatus composed of a series of parts united by screw-threaded joints, the inclined threaded branch pipe, the cast fitting F, having an inclined threaded opening to receive the threaded end of said branch pipe at a rising grade, and a second larger threaded opening at its upper end, and the separable screw-neck flange F', threaded on its external surface and entering said enlarged end of said fitting, as set forth."

These were likewise rejected by the Examiner, whose decision was affirmed on appeal to the Examiners-in-Chief and Commissioner, successively.

Appeal was then taken to the Supreme Court of the District of Columbia, where the Commissioner's decision was affirmed June 13, 1892. The bill sets out the proceedings in the Patent Office especially to show jurisdiction under section 4915, Revised Statutes, and—

"prays that the said adverse decision may be reversed and that this court order that he be adjudged and

declared entitled to Letters Patent for his invention as set forth in said application or of such part or parts thereof as, upon due consideration, may be found patentable, etc."

During the taking of testimony complainant gave notice that upon the hearing he would ask the court to consider the following claims in addition to those contained in the application referred to:

"4. In a drainage apparatus, the combination, with a soil or drain pipe, of the fitting E.

"5. In a drainage apparatus, the combination, with the soil or drain pipe, of the trap B.

"6. In a drainage apparatus, the combination, with the soil or drain pipe, of the fitting D, connected therewith.

"7. In a drainage apparatus, the combination with the soil or drain pipe of the fitting F connected therewith.

"8. In a drainage apparatus, the combination, with a soil or drain pipe composed of metal sections united by fittings and forming a rigid structure which will remain intact, being supported from some part thereof, of a branch pipe adapted to support a water-closet.

"9. In a drainage apparatus, the combination, with a soil or drain pipe composed of metal sections united by fittings forming a rigid structure which will remain intact, being supported from some part thereof, of a water-closet fitting receiving support therefrom independent of the building in which it is placed.

"10. In a drainage apparatus, the combination with a soil or drain pipe fitting E and trap B.

"11. In a drainage apparatus, the combination, with a soil or drain pipe, of the fitting E and fitting D.

"12. In a drainage apparatus, the combination, with a soil or drain pipe, of the fitting E and the fitting F."

The original application was rejected in the Patent Office for want of patentable novelty and chiefly on the ground that it was covered by a former patent to Durham for a drainage apparatus, No. 235,754, dated December 21, 1880, and another for elbow-fittings for drainage-pipes, No. 258,391, dated May 23, 1882, and also anticipated in other particulars by patents to others, both American and English.

The testimony of a number of eminent experts was introduced by complainant in support of his claim of invention. The only evidence on behalf of the Commissioner consists of the patents referred to.

The specifications upon which the pending application is based are as follows:

"My invention relates to drainage apparatus for buildings and the like, and the novelty consists in the arrangements and adaptability of the parts, and in the construction of an air and water tight apparatus as an independent structure.

"It has only been known within a few years that the principal object to be attained in a drainage system, after the main purpose of providing a conduit for the sewage was secured, was to make gas-tight joints that would be unaffected by the usual influences to which such apparatus was subjected. In December, 1880, I received United States Letters Patent No. 235,754, for an apparatus which by the use of wrought-iron pipe and cast fittings was rendered independent of vertical support from the building and remained intact and unaffected by any usual rocking or settling thereof. In the specification of that patent, I pointed out the inherent defects in the drainage apparatus then usually employed,

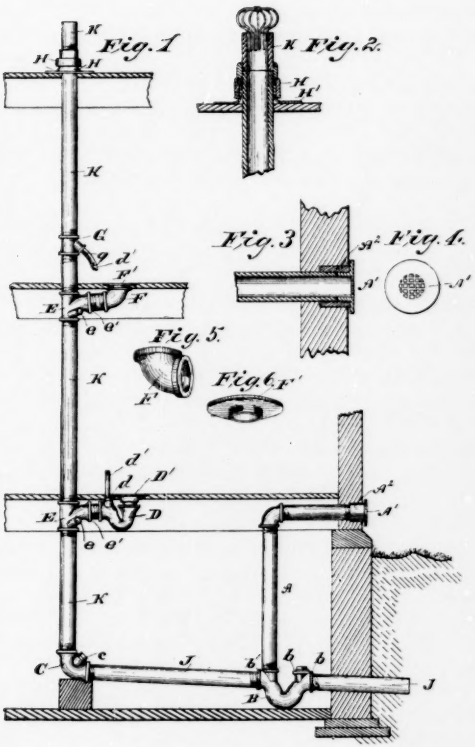
and since that time there has been little advance in the state of the art. The apparatus described in the patent above named has gone into extensive use, and experience in its manufacture and discoveries made by me since that time, have resulted in my making the improvements and inventions which are the subject of the present altercation. In particular, I found that it was not only desirable to make a gas-tight apparatus which would retain its integrity if adequately supported from below the soil-pipe, but it was necessary to construct an apparatus which should retain its gas-tight quality if it received adequate support for its weight at any point, and would be rigid and self-sustaining as a whole; in other words, to make the entire apparatus an independent structure in itself, and which might be supported from one floor or the roof of a building, or from beneath the soil-pipe by the earth or by an independent pier or piers and under all such conditions be capable of remaining integral and gas-tight, and entirely unaffected by usual conditions. This result was attained only after a long and costly series of experiments and tests, and it became necessary to redesign some portions of the apparatus, and to so modify others as to make a structure entirely novel in view of the result sought to be accomplished. Steam-fittings, which naturally suggested themselves in this connection, were found to be unsuitable, as they were not designed for my purpose and were not strong enough and required other modifications in details which will be hereinafter described in connection with the drawings hereto annexed. I likewise found that outside of large cities, it was practically impossible to obtain proper workmanship to secure the erection of my apparatus in the proper manner, and I found it necessary to invent some method by which the apparatus could

be readily and easily erected by unskilled labor. Usually the efficiency of a drainage system depends more upon the honesty and skill of the workmen who erect it than upon its own excellence of design or fitness for its special purpose. With this end in view, I conceived the idea of making the pipe and fittings to be used in my apparatus of standard size, so that the parts so made would be interchangeable. The strength of the various parts was calculated anew, the soil-pipe made in sections and cut with threads of standard size, was designed sufficiently strong to support any weight that could be placed upon it in the relations in which it would be used, the cast fittings and branch pipes and other smaller parts of the apparatus were likewise made so that they in turn could uphold and sustain the weight of the soil-pipe and its connections. The relatively great strength of well-made wrought and cast iron enabled me to design the apparatus in proportions, which did not offend the eye, and yet permitted the use of a comparatively high factor of safety. By having the work of cutting the screw-threads, and the like, done in a finely-equipped machine-shop under the supervision of a trained engineer, I secured the result sought, and obtained a drainage apparatus which could be completely prepared in the place of manufacture, safely shipped to a distant place and erected by unskilled workmen, the parts fitting so accurately that it was practically impossible to put them up improperly, and the strength of the parts securing all the desirable qualities above enumerated.

"When made as indicated, my apparatus forms an independent structure, as though it were made of one piece of metal, the tube having a smooth interior surface without obstacles, gas-tight and maintaining the rigid relation of its parts under any usual strain.

"I am well aware that attempts have been made to construct a drainage apparatus out of wrought-iron pipe and steam-fitters' castings, but it lacks the unity of purpose and efficiency of result secured by my specially-designed fittings, and most of them present (September 14, 1889) interior depressions, and require some connections not made with screw-joints.

"In the accompanying drawings the same letters of reference indicate similar parts in all the figures, and Figure 1 represents a side elevation of my improved drainage apparatus parts of the building being in section. Figs. 2, 3, 4, 5, and 6 represent details specially referred to hereinafter."



"In the drawings, A represents an air-inlet pipe for admitting fresh air to the drainage apparatus from a point outside of the building. The open end is guarded by a grating A′ screwed into an adjustable coupling A^2, of the pipe, shown in details in

Figs. 3 and 4, and the lower end is screwed into the cast iron running-trap B and the running-trap B is a water seal against the passage of foul air from the sewer into the drainage apparatus; it is provided with four threaded openings, one vertical and one horizontal at either end; the horizontal openings *b'* receive the threaded sections of the drain-pipe J and the openings *b* in one instance receive the air-inlet pipe and in the other acts as a clean-hole and is closed with the screw-plug. The openings to receive the drain-pipe are so tapped as to permit of a grade or fall in the line of the drain, while the opening to receive the air-inlet pipe is usually adapted to permit that pipe to be erected vertically. In the case of this cast fitting, as well as the others which we shall hereinafter describe, the inner shoulder is cast in the fitting used so that when united to the pipe a flush and continuous inner surface is obtained. The thread which unites the pipes and castings are likewise cut with a slight taper so that the farther they are screwed together the tighter the joint becomes, while hand-holes are made in all castings at every change of direction, permitting an easy examination at all points where stoppage of the flow is liable to occur. The cast elbow C has a threaded opening tapped at a turn to receive the drain J and another threaded opening to receive a soil-pipe K. Cleaning-hole *c* is closed with a screw-plug.

"The cast fitting E is a water-closet "J" with a threaded opening *e*, tapped a grade to receive the branch pipe, with the upper and lower openings to receive the sections of the soil-pipe, and a small opening *e*, to receive a waste-pipe from a bath-tub or bowl, or the like.

"D is a cast water-closet trap for use under a closet which requires a trap beneath the floor. It

is provided with a threaded opening tapped at a grade to receive the branch pipe, a smaller opening *d* to receive a vent-pipe and a cast flange D′ to which the closet is attached by set-screws. It is supportable from the casting D and is threaded so that a nipple of another length may connect it with D, thus enabling it to be used where the casting D could not alone be placed owing to the narrow space between the joists.

"When the fittings E, D, and D′ are properly connected together, the plane of the surface of the flange D′ will be at right angles to the line of the soil-pipe, notwithstanding the rising grade of the branch pipe. The cast-iron elbow F and the flange F′, shown in Figs. 1, 5, and 6, are for use where the water-closet does not require a trap beneath the floor, and is specially adapted where the joists are close and shallow. The elbow F has a lower threaded opening to receive the branch pipe at a rising grade and an upper threaded opening of larger diameter into which the neck of the flange F′, the outside of which is threaded, adapted to receive the water-closet which is clamped to it, is screwed.

"The cast-iron 'Y' branch G is provided with three threaded openings, an upper and lower one to receive the soil-pipe and a side opening to receive a vent-pipe.

"The soil-pipe projects through the roof of the building and is left open or provided with a scowl or basket, as shown in Fig. 2. Where the pipe projects through the roof a neck of lead or tin flashing placed around it is joined to the roof by means of any suitable water-tight connection. A collar H is screwed on the soil-pipe so as to overlap or embrace the upper edge of the flashing and prevent leakage down the soil-pipe. The collar H is

provided with a thread cut rather large, so as to screw down on the soil-pipe far enough to allow of a coupling above it.

"It is obvious that the air-inlet pipe and the drain-pipe may be continued outward from the building to any convenient place, and that any number of drain-pipes, soil-pipes and connections may be used without departing from the principles outlined above.

"My drainage apparatus being specially adapted for the use to which it is put, and being strongly made, with gas-tight joints, and capable each part of sustaining the others and being able to resist all ordinary strains, it requires little or no repair, and being made as it is it can be sold to be put up in a distant place with almost the same ease as staple commodities."

The first question for consideration is the error assigned upon the action of the court below in confining complainant to the three claims finally presented for the action of the Commissioner of Patents and in the consequent refusal to consider the nine additional claims, of which notice had been given before the hearing.

The contention of complainant is substantially that he is not bound or concluded by his action in presenting but three of his claims for adjudication in the Patent Office, because this is a new and independent proceeding in equity, to be conducted according to the ordinary procedure in the courts thereof, and hence that he is now entitled to claim every and any thing that might be disclosed by the specifications of his application or any part thereof. In this view we cannot concur.

The right to file the bill is conferred by section 4915, Revised Statutes, by these words:

"Whenever a patent on application is refused, either by the Commissioner of Patents, or by the

Supreme Court (now Court of Appeals) of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for parts thereof as the facts in the case may appear."

In *Butterworth* v. *Hoe* (29 O. G., 615; 112 U. S., 50–62) it was said that the proceeding authorized by the foregoing section was not a technical appeal like that given in section 4911, and could be heard upon all competent evidence introduced therein.

This is all that was actually decided in the case specially relied on by appellant. (*Ex parte Squire*, 3 Ban. & Ar., 133.) In *Gandy* v. *Marble* (39 O. G., 1423; 122 U. S., 432–439) it was said that, although the proceeding is not a technical appeal from the Patent Office—

"yet the proceeding is, in fact and necessarily, a part of the application for the patent,"

and it was consequently held that a delay of more than two years in filing the appeal after the last action upon the application had in the Patent Office was fatal under the provisions of section 4894.

The reasoning in support of appellant's contention is founded largely in the assumption that a person may file his application, describe his supposed invention in general terms, and make in general claim or claims, and that thereupon it becomes the duty of the authorities of the Patent Office to discover just what the applicant's invention really is in its fullest scope and effect, and award him a patent therefor.

Whatever may have been the policy of the early statutes in this regard the assumption is clearly op-

provided with a thread cut rather large, so as to screw down on the soil-pipe far enough to allow of a coupling above it.

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"yet the proceeding is, in fact and necessarily, a part of the application for the patent,"

and it was consequently held that a delay of more than two years in filing the appeal after the last action upon the application had in the Patent Office was fatal under the provisions of section 4894.

The reasoning in support of appellant's contention is founded largely in the assumption that a person may file his application, describe his supposed invention in general terms, and make in general claim or claims, and that thereupon it becomes the duty of the authorities of the Patent Office to discover just what the applicant's invention really is in its fullest scope and effect, and award him a patent therefor.

Whatever may have been the policy of the early statutes in this regard the assumption is clearly op-

posed to that declared in the revision of the patent laws in the act of 1870, the effect of which was to impose upon the applicant the duty of ascertaining, pointing out, and claiming what he supposed his invention to be. Section 4888, Revised Statutes, which governs the application, expressly adds to this language of the former act that—

"he shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."

The purpose of this change in the statute is well stated by Judge Dallas, as follows:

"The practice of the profession and the opinions of the judges, to which I have adverted, had suggested that the embarrassments attendant upon the efforts of the courts to construe vague and indefinite patents might, without doing injustice to patentees, be much alleviated by denying protection for anything, though original, new and useful, which was not also distinctly claimed. In brief, it was prescribed that the claim must be taken as defining precisely what the invention covered by the patent is, and hence the true question is not what the patentee might have claimed, but what he has claimed, the latter, not the former, being made the measure of his right. The rules for determining what is claimed in any case are few and simple and are not peculiar to the patent law except as respects the doctrine of liberality in construction in favor of pioneer inventors. * * * It is sufficient to say that if the language of a claim has a plain and distinct meaning that meaning must prevail. That which is to be ascertained is, of course, the intent of the claimant, not, however, that intent as elsewhere or in some other manner disclosed, but as expressed in the claim itself. (*Durand* v. *Green*, 67 O. G., 814.)"

The law imposes upon the applicant the duty of looking after his own interest. The Commissioner and his subordinates are charged with the protection of the interests of the public, while treating the applicant with fairness and liberality. This seems to be the conclusion of the Supreme Court in *Miller* v. *Brass Co.*, (21 O. G., 201; 104 U. S., 350–354,) where Mr. Justice Bradley said:

"It was probably supposed that the patentee would never err in claiming too little. Those who may have any experience in business at the Patent Office know the fact that the constant struggle between the Office and the applicants for patents has reference to the claims. The patentee seeks the broadest claim he can get. The Office in behalf of the public is obliged to resist this constant pressure."

When the appellant filed his application and specifications, he made his claim thereon. These he changed from time to time during the many years spent in trying to obtain a patent, amending his application also to meet the objections of the Examiners.

He was under no obligation to conform to those objections or to abate any part of his claim. He had his election to stand by his specifications and claims and to demand a decision thereon as presented, with the right to appeal therefrom, if adverse, to the court directly, as provided in section 4911, and indirectly through bill in equity under section 4915, or to amend his application, alter his specifitions, and abandon any part or parts of his claims based thereon.

It is a rule of general application, though not without its exceptions, that one who has two separate and distinct remedies is barred of his pursuit of one by his election to pursue the other.

If, after all these amendments, he had overcome the objections made by the Examiner and received a patent on the three claims finally relied on, the patent would have covered them, and nothing more. (*Roemer* v. *Peddie*, 49 O. G., 2151; 132 U. S., 313-317.)

"The claim of a specific device or combination and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public. (*Miller* v. *Brass Co.*, 21 O. G., 201; 104 U. S., 350-352.)"

See, also, *Miller* v. *Eagle Co.*, (66 O. G., 845; 151 U. S., 186-202;) *Deering* v. *Winona Harvester Works*, (69 O. G., 1641; 155 U. S., 286-296.)

Having elected to amend again and again and finally to stand upon the three claims which were rejected, we think that the abandonment of all else is as complete as if he had succeeded and received his patent thereon. It is that application, with these claims only, upon which his patent must issue, if successful here. Nothing else has been refused him in the Patent Office. All decisions of which he complains and which authorize him to institute this proceeding are upon them alone.

Our construction of the statutes finds some support also in a recent case in the Supreme Court of the United States, where the proceeding under section 4915 is likened to a suit to set aside a judgment, (*Morgan* v. *Daniels*, 67 O. G., 811; 153 U. S., 120,) and it would, indeed, seem to be a proceeding in the nature of a bill of review more than anything else.

In support of their contention counsel for appellant have referred us to the history of the act of

1870 in Congress, as shown by the various amendments, the reports of committees, and the remarks made by the chairman of the Patent Committee, Mr. Jenckes, on the final passage. Had section 51 of the original bill remained our view might have been different; but it was stricken out by the Senate, and the House concurred.

In the case of *Bate Refrigerating Co.* v. *Sulzberger*, (70 O. G., 1633,) (March 4, 1895,) decided since the submission of this cause, the Supreme Court of the United States, responding to a like reference to the history of the bill in Congress, and speaking through Mr. Justice Harlan, said:

"Nor can we assume that the House of Representatives, much less the Senate, based their action upon the opinion of individual members of the House as to the scope and legal effect of the report of the revisers. Comparing the bill reported by the House Committee on Patents with the act as it passed we find it means to sustain the view taken by the plaintiff."

We conclude, therefore, that the court did not err in refusing to consider the additional claims as properly before it, and that the case must be determined upon the three claims only which were finally passed upon in the Patent Office.

It remains now to consider whether the claims before us show patentable novelty—that is, whether they disclose an invention, in the sense of the patent law, of something both useful and new in the art of house-draining.

The burden is upon the complainant to establish the affirmative by proof that is clear and conclusive, (*Morgan* v. *Daniels*, 67 O. G., 811; 153 U. S., 120,) and this must not be overlooked in considering the evidence in its several independent parts and as a whole.

The case of complainant is strongly supported by the testimony of some distinguished experts in sanitary engineering, who controvert the references made by the expert Examiners of the Patent Office, as well as their conclusions thereon. We have no reflections to make upon expert testimony. It is often satisfactory and sometimes necessary in the elucidation of questions of science and art, and, so far as the experts in this case have given us the history of the progress of the art of house-drainage and other facts and have explained the purposes and operations of the different appliances, devices, and fixtures for use therein, we have given much weight to their testimony; but what is an invention or a patentable novelty is a question of mixed law and fact, and hence the opinions of these witnesses, no matter how learned and able in their own professions, cannot be given so much weight in its solution, much less substituted for the judgment of the court thereon.

The testimony lays great stress upon the defects in the old methods of house-drainage, the years devoted by Durham to their improvement, the devices used, and the final combination by him of materials, fittings, and devices, through which he has given to the public a useful, safe, economical, and easily-constructed system of house-drainage vastly superior in its efficiency to any system or combination ever used before. It is, in great part, upon the utility of the new system, the general recognition thereof by sanitary engineers, and the consequent general use into which it has gone that the experts base their opinion with respect to its being an invention.

The difficulties which lie in the way of determining what is an invention and the impossibility of

establishing a general definition applicable to all cases is well stated by Mr. Justice Brown in *McClain* v. *Ortmayer*, (59 O. G., 1229; 141 U. S., 419–426.) He says, among other things, that—

"to say that the act of invention is the production of something new and useful does not solve the difficulty of giving an accurate definition, since the question of what is new, as distinguished from that which is a colorable variation of what is old, is usually the very question in issue."

It is the very question for determination in this case.

Conceding that Durham has produced something of very great utility does not determine his case. It must also be something new. He must show its patentable novelty with clearness and certainty. The combination of novelty with utility is essential in the patent law. (*McClain* v. *Ortmayer*, *supra*.) In that case it was also said:

"The extent to which a patented device has gone into general use is an unsafe criterion of its actual utility."

It is true that in the construction of a patent the immediate general use into which its subject-matter has gone has often been considered sufficient to turn the scale in doubtful cases in favor of the existence of invention, (*Topliff* v. *Topliff*, 59 O. G., 1257; 145 U. S., 156; *Krementz* v. *S. Cottle Co.*, 69 O. G., 241; 148 U. S., 556–560,) but it is evidence only, and has no weight at all, except where the question is otherwise in doubt, and then has very little on a question of patentable novelty. (*Grant* v. *Walter*, 63 O. G., 910; 148 U. S., 547–556; *Duer* v. *Cabinet Lock Co.*, 63 O. G., 1060; 149 U. S., 216; *Olin* v. *Timken*, 65 O. G., 1593; 155 U. S., 141–155.)

Another thing to be borne in mind, and which to some extent, it seems, has been ignored by the experts, is that the principle, an idea, or a purpose is not the subject of a patent.

"The invention covered thereby must consist of new and useful means of obtaining that end. In other words, the subject of a patent is the device or mechanical means by which the desired result is to be secured. (*Knapp* v. *Morss*, 65 O. G., 1593; 150 U. S., 221–227.)"

The record shows, and the same will be particularly referred to later, that a patent for a drainage apparatus was issued to Durham in 1880, and another for an improved elbow-fitting for use therein was issued to him in 1882.

The application in this case, being for a like subject-matter, must be considered also in the light of another well-established rule, which is that no patent can be issued, especially to the same patentee, for an invention actually covered by the former, although the terms of the claims may be different, and that a second patent can be sustained only where it may cover matter described in the first—

"essentially distinct and separate from the invention covered thereby. (*Miller* v. *Eagle Mfg. Co.*, 66 O. G., 845; 151 U. S., 186.)"

And in that case it was also said:

"It is settled that one inventor may make a new improvement in his own invention, of a patentable character, for which he may obtain a separate patent, and the cases cited by the appellee come to this point, and to this point only, that a Letter Patent may be granted where the invention is clearly distinct from and independent of the one previously patented."

It was said, also, in another case:

"Courts should regard with jealousy and disfavor any attempts to enlarge the scope of the application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use. (*Railway Co.* v. *Sayles*, 15 O. G., 243; 97 U. S., 554–563.)"

Turning now to the testimony, it appears that the idea of removing sewage from buildings was old. The systems in use were defective and dangerous for want of proper appliances to prevent leakage of gas. The minds of many were directed to improvements therein, as the records of the Patent Office in this country and Great Britain disclose. Complainant testified that he was educated as an engineer and has made a specialty of house sanitation, having great experience therein.

He says that in Chicago, where he resided in 1879—

"the usual practice was to use a combination of earthen-ware, lead and cast-iron pipe, and the drainage apparatus commonly used consisted of a "pan" water-closet set upon the floor to which it was screwed. Beneath this was a lead trap which connected at its lower extremity with a vertical soil-pipe having what is called a bell-mouth at its upper end and was soldered thereto or cemented; the lower end of this cast-iron pipe was set in an earthenware drain made in short sections which was tight or not, depending upon the skillfulness or integrity of the person who erected it."

This apparatus was fastened in or to the wall of the building and depended thereon for its support.

Complainant's first improvement upon the old methods was secured to him by Patent No. 235,754, dated December 21, 1880. The essential point then was, he says, to secure a support for the system of pipes and fixtures independent of the building, to prevent breaks and leakage caused by the settling of the building, which was common in Chicago on account of the peculiar character of the soil.

In order to secure a rigid structure that would be self-supporting, he used steam-fittings, with two exceptions, and he says of these two fittings:

"It is especially important to notice that these had no screw-joints. The device secured to me by that patent consisted of a main drain or iron pipe with the several sections united by bolts passing through flanges. On this drain as a foundation, the soil-pipes were erected."

This was supported on a foundation independent of the building, and the ventilation was effected by a pipe connected with a drain extending up through the chimney-flue, so that heat would aid the ventilation.

The drawings of the first invention show the rigid pipes joined by steam-fittings, with round elbow screw-fittings for branch pipes. The drain-pipe is inclined from the junction with the soil-pipe to the sewer and has a running-trap with two hand-holes, which run obliquely into the pipe at the top of the trap, one on each end. Between this trap and the soil-pipe junction the ventilating pipe is inserted. The drain-pipe is made in sections with flanges fastened together with bolts. The soil-pipe is connected by screw-fittings.

The drawings and specifications, showing the claims in controversy, give the same rigid soil-pipe upon its independent foundation, with branch connections at

an acute instead of a right angle. The fittings are all screwed into threads specially made and so arranged as that the diameter of the pipe at each connection remains unchanged. The drain-pipe is also connected by screw-threads instead of with flanges and bolts, as in the old. The connection between the soil-pipe and drain-pipe is a long curved elbow so shaped as to retard the flow as little as possible. The running-trap has the hand-holes extending vertically into each end of the trap. One of these is covered by a screw-top, and in the other and inside one is fitted the end of a ventilating pipe, which extends to a point outside the house, receiving fresh air, which is carried upward and out through the soil-pipe, which extends through the roof.

When called upon on his own behalf to explain the difference between his old and new apparatus, he named five points:

First. A difference in function in the substitution of the fresh-air ventilation for the hot-air pipe.

Second. Difference in parts in the substitution of fittings of long curvature, specially designed, for the steam-fittings of short curvature.

Third. Difference in detail in adding the new fittings having connections which screw in with threads specially adapted therefor, for the same inner diameter of the pipe, with a curvature allowing a proper fall or descent from horizontal pipes into the vertical soil-pipe.

Fourth. The new apparatus is more easily erected by unskilled workmen, who can screw the parts together as numbered.

Fifth. Increased economy, because the parts can be made at the factory and put together by unskilled workmen.

To do complete justice to the claim of appellant, we will give his own elaborate and evidently carefully-prepared answer to the question of his own counsel, as follows:

"Please state to the court what are your reasons for believing that your new apparatus, as compared with the old one or with the prior state of the art, at the time it was invented by you, constitutes an invention?

"Answer. In the production of a drainage apparatus which should be satisfactory to me, and which should perform the functions properly, I found that the ends to be attained were that the removal of sewage, when it once commenced, should be uninterrupted; that the structure in which it takes place should be incapable of rupture while in place, and that it should be properly ventilated. I claim to be reasonably skillful in my profession, and I spent many years in attempting to produce a structure which would fulfill these requirements. I first attempted to use steam-fittings and steam pipes to accomplish my purpose, as shown in the apparatus described in my former patent, and while I did not altogether use screw-joints in that patent, I was aware that pipes and fittings might be so united and could probably produce a structure more nearly gas-tight than when formed by joining adjacent flanges. The apparatus constructed by me and described in that patent failed to meet the requirements that I speak of in a satisfactory manner. The interior of the conduit formed by the combination of pipes and their connecting parts was not uniform, and the stoppage of the flow of sewage therefore liable to occur. The steam-fittings used were also made with square angles. The structure, moreover, was weak at the flange-joints, and such method of joining was too costly. The scheme of

ventilation also was difficult to apply; it involved the use of a hot flue and drew the gases down through the house instead of upward, as preferred by sanitary experts. The apparatus described in that patent was widely illustrated and discussed in the technical journals and its durability and efficiency considered by the profession. It certainly marked an immense advance in the art, as had been previously practiced. Under these circumstances, and while I was endeavoring by the exercise of mechanical skill, and such engineering knowledge as I possessed, to perfect this device, it suddenly occurred to me, as I have before stated, that by making the parts of the apparatus interchangeable in order to secure ease of construction and erection, by having threaded connections, in order to secure tightness and strength, by designing fittings specially adapted for the exigencies of house-drainage and by ventilating the apparatus thus made from the bottom upward, instead of from the top downward, and finally by making this entire structure so strong and durable that it would form an integral whole which could not be caused to leak by the extraordinary application of any strain that would not destroy the building itself, that I would meet all the requirements of the problem in a manner satisfactory to myself. I subsequently discovered that I had obtained in the construction of this apparatus two great additional advantages, viz: economy in construction, and subsequent freedom from repair. In my opinion, this idea, coming to me by a sudden flash of thought, and instantly solving a problem which had been before my mind for years, did not constitute the mere exercise of technical skill or the mere application of excellence of workmanship, or the mere adaptation of an old thing to a new purpose, or the mere substitution of new materials to old analogous uses,

but did constitute an exercise of that higher faculty of mind, which is termed invention. Of course, being vitally interested in a result of this litigation, I have examined with great care and intense interest the argument made by the Patent Office adverse to this conclusion, and I have been the more amazed at their position, because I have been continually astonished at the slight and trivial results of the lowest degree of mechanical skill for which patents have been granted."

Before proceeding to the further consideration of the three claims upon which the application must be granted or denied it is necessary to eliminate one important element in complainant's apparatus. As we have seen, he claims a difference in function between the new and old apparatus, based on the radical change made in the ventilation method and devices. This is undoubtedly a great improvement in the direction of safety, efficiency, and economy. It constitutes a very important part of the new system, and, it may be granted, sustains the claim of difference in function between the old and new apparatus; but this does not help complainant's case, because it was not invented by him.

When his attention was called to the mode of ventilation provided in the patents to Sargent, McDermot and Hyde, Mulligan and Pike, he said:

"The citation of patents on trap and drainage ventilation is not relative because I do not claim to have invented any new method of ventilation."

Some space may be saved without confusion by considering the first and second claims together. They are:

First. The general combination of drain, soil, and branch pipes—

"all of wrought metal and having cast fittings, said parts being united by screw-threaded joints, and

forming when screwed together, a rigid and continuous structure which will remain intact throughout its entire length being supported from some part of the building as the conditions thereof may require."

Second. The second is founded on an inclined drain-pipe, a series of threaded interchangeable parts, and a running-trap in the drain-pipe, with two inclined threaded openings for filling at each end and vertical openings at the trap, in one of which, on the house side, is screwed the fresh-air ventilating-pipe.

As we have seen heretofore, the patent of 1880 covers a rigid and continuous structure with cast fittings. This was supported by a foundation at the bottom independent of the building, so as to avoid injury from the settling of the house.

The drawings of the new structure show the same foundation as the old; but it appears that as now manufactured the support is obtained by attachment to floors of the buildings, which answers the purpose even better. Long before this steam-pipes had received their support in the same general way. In our judgment this change of mode of support, if novel, did not constitute invention. It was merely the practice of mechanical skill. If this conclusion needed support, it would find it in the history of the case of the *Durham House Drainage Co.* v. *James Armstrong* in the Circuit Court of the United States for the Southern District of New York, decided in November, 1888, the proceedings in which are in evidence.

Armstrong was engaged in constructing the drainage of a tall building in the city of New York, called "Trinity Factory," and was sued in March, 1886, for infringement on complainant's 1880 patent. Complainant and his experts were positive in the

assertion of the opinion that the whole structure was supported on a foundation at the bottom. It did not occur to them that the support was by fastening to the floors; but it was made clear that there was no support at the bottom at all, and that it was wholly in the fastenings of the branch pipes to each floor. Armstrong claimed nothing but mechanical skill in this manner of support, and would seem to have anticipated complainant therein. (Compare original application of January 10, 1885, Record, p. 125, with amended application, copied hereinabove.)

Taking up the differences in the parts employed in the two apparatus "and in detail, in that new parts are added," as testified to by Durham, and, where these exist, resorting to the other patents cited as references, we will consider them in order.

There is no invention in the substitution of one kind of material for another—as, for instance, wrought-iron for cast-iron—or in the substitution of a screw-joint for a flange-and-bolt connection, (*Hotchkiss* v. *Greenwood*, 11 How., 248; *Hicks* v. *Kelsey*, 5 O. G., 94; 18 Wall., 670; *Florsheim* v. *Schilling*, 53 O. G., 737; 137 U. S., 64–76;) but if there were we find these substitutions provided for in the patent of 1880. Turning to the specifications therein it appears that—

"the waste-pipe may be made either of wrought or cast iron pipe, and the different sections should be joined together with some kind of close or tight joints in order to prevent any leakage or escape of gases. If wrought-iron pipe is used the different sections or nipples are united with the ordinary screw or steam fitting joint."

The foregoing disposes at least of so much of the conclusion of Waring and other experts with respect

to patentable novelty as is founded in the premise that the new system—

"avoids the use of cast-iron pipe. It has no bolted flange-joints. It is surported from any convenient part or parts of the building."

The new fitting of long curvature substituted for the common elbow steam-fitting of short curvature was patented to Durham separately May 23, 1882, No. 258,391. The drawing and specifications in that patent show and claim—

"the elbow screw-fitting connecting the soil-pipe with the main drain—"

and show, further, that—

"each of these screw-fittings is made of the same interior diameter as that of the pipe or pipes connected and are provided with an enlargement or recess at their ends in which the screw-threads are cut.

* * * * *

"My improved elbow-fitting is specially designed for use with my drainage system heretofore patented to me and in which iron drainage-pipes connected by screw-fittings and supported on foundations independently of the buildings are employed."

The manner in which the screw-joints of this elbow are made and adjusted so as to preserve the continuous diameter of the pipe, thereby facilitating the flow and preventing the deposit of matter which formerly took place in the old steam-fittings, is a very important and valuable feature or principle of the improved system, on which great stress is laid by the experts; but it was known long before it was utilized by Durham. It is found in a patent issued to John Hoskin, December 15, 1874, for connecting the tubes used in Artesian wells, and in another to George H. Webster, May 8, 1877, for connections

in pipes in house-drainage. The inclined drain-pipe with running-trap is shown in the drawings of the 1880 apparatus also, but with hand holes running obliquely in the same instead of vertical, as in the new. In addition, Knight's patent, February 20, 1878, shows the running-trap with vertical hand-holes at each end. Stewart's, April 10, 1876, shows the trap with hand-holes in the metal of the curve and a ventilating-pipe hole adjoining. Pike's patent, December 30, 1884, shows the running-trap in an inclined drain-pipe, with a hand-hole at one end and a fresh-air pipe at the other, shown in the drawings to enter vertically. Hornibrook's English patent shows practically the same drain, trap, and hand and ventilating holes.

Third. The third claim is for the apparatus composed of the series of parts united by screw-threaded joints, the inclined threaded branch pipe, the cast fittings with inclined threaded openings to receive the threaded end of the branch pipe at a rising grade, and the second larger threaded opening at its upper end, and the separable screw-neck flange threaded on its external surface and entering said enlarged end of said fitting, this latter being the connection into which was set or screwed the closet-drain.

We have heretofore shown the want of novelty in the screw joints of the device by which the continuous diameter of the pipes remains unbroken.

The connection of the water-closet through means of screw joints and fittings was also old. (See patents to Craigie, May 11, 1869; to Dacey, June 29, 1869; Kernochan, July 24, 1877; and see, also, *Denton's Sanitary Engineering*, p. 73.)

The connection of the inclined branch pipe with the vertical soil-pipe at an acute angle, instead of at right angles, practically, with the short elbow for

steam-fitting, as was the case in the old apparatus, is a very useful improvement thereon, and, as regards that, may be said to be new; but it is not new when considered in connection with others. The patent to McDermott and Hyde, February 12, 1878, shows the same descending branch connection with the soil-pipe, and its second claim is for "a section of drain-pipe having an inclined branch." Townsend's patent, July 5, 1881, shows the same inclined branch connection. The catalogue of the J. L. Mott Iron Works shows several designs of single and double Y connections with screw-threads as manufactured for the trade.

The special claims laid by Durham in his own testimony to novelty in his branch-pipe connections and fittings consist of the preservation of the continuous diameter of the pipe and of the peculiar formation of the screw-threads, so as to screw tightly onto the branch pipe on its descending grade, the grade being determined thereby. Of the first ground it is needless to say more.

As regards the second, our attention has been called to no similar cast-iron screw-fitting, unless, as seems highly probable, the same tap of threads was necessarily used in the long curved fitting patented to Durham in 1882, by which the vertical soil-pipe was connected with the drain-pipe at something greater than a right angle by reason of its descending grade. It is a very useful contrivance in a complete apparatus for house drainage and adds greatly to the advantages of complainant's system, even if not a part of his patent of 1882 or embraced therein. We are not, however, prepared to say that it rises to the dignity of an invention.

"All improvement is not invention and entitled to protection as such. Thus to entitle it, it must be

the product of some exercise of the inventive faculties and it must involve something more than what is obvious to persons skilled in the art. (*Pearce* v. *Mulford*, 18 O. G., 1223; 102 U. S., 112; *Knapp* v. *Morss*, 65 O. G., 1593; 150 U. S., 221–227.)"

Having examined the different parts and devices in detail, it remains to consider the fact of the combination as a whole.

A patent is not to be refused merely because the invention is the result of a combination of old devices;

"but the result must be a product of the combination and not a mere aggregate of several results each the complete product of one of the combined elements. * * * Merely bring old devices into juxtaposition, and then allowing each to work out its own effect without the production of something novel is not invention. (*Hailes* v. *Van Wormer*, 5 O. G., 89; 20 Wall., 353–368.)"

The following language of Mr. Justice Matthews, referring to another combination claimed to be an invention, is directly applicable to the improved drainage system which we are here asked to order patented:

"Beyond the separate and well-known results produced by them separately, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part,

per my et per tout, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a different character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions, otherwise it is only a mechanical juxtaposition, and not a vital union. (*Pickering* v. *McCullough*, 21 O. G., 73; 104 U. S., 310–317.)"

See, also, *Reckendorfer* v. *Faber*, (10 O. G., 71; 92 U. S., 347;) *Glue Co.* v. *Upton* (97 U. S., 3;) *Hollister* v. *Benedict*, (113 U. S., 59–72;) *Thompson* v. *Boiselier*, (31 O. G., 377; 114 U. S., 3–11;) *Thatcher Heating Co.* v. *Burtis*, (39 O. G., 587; 121 U. S., 286;) *Knapp* v. *Morss*, (65 O. G., 1593; 150 U. S., 221–227;) *Market St. Cable Co.* v. *Rowley*, (70 O. G., 632; 155 U. S., 621–629.) In the last case a claim was rejected because—

"obviously within the principle, so often declared, that a mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substitution of some means, with better results, is not such an invention as will sustain a patent:"

See, also, *Roberts* v. *Ryer*, (10 O. G., 204; 91 U. S., 150;) *Smith* v. *Nichols*, (21 Wall., 112–119.)

The cases of *Webster Loom Co.* v. *Higgins* (21 O. G., 2031; 105 U. S., 580) and *Potts* v. *Creager*, (70 O. G., 494; 155 U. S., 597,) relied on by appellant, are distinguishable from this case.

The former was a case of a combination of the advantages of an old device, skillfully divested of some defects, with another. The result was to increase the capacity of the same loom from forty yards per day to fifty yards. The great utility of the invention commended it to the favor of the

Court, and it was held to fall within the rule thus enounced by Mr. Justice Bradley:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention."

In the latter (*Potts* v. *Creager*) the bill was for an infringement of a patent for a machine for disintegrating clay. The machine consisted of two revolving rollers, upon the periphery of one of which were set, in longitudinal grooves, a number of projecting steel strips, against which the clay was pushed by the other roller as it passed between the two.

A number of machines were relied on as anticipations, such as for grinding wood pulp and grain, cutting fruit, hulling seeds, etc. The only machine enough like complainant's invention as to require explanation by the Court was one for polished wood. All others were said to differ radically. The wood-polisher had two rollers with strips of glass set in one in a manner similar to the steel strips in the complainant's machine, which polished the boards as they passed between the rollers

The machine did not work, and, in the language of the Court, "appears to have been merely an abandoned experiment." In deciding in favor of the invention much stress was laid upon the remoteness of the uses of the two machines. Mr. Justice Brown, who delivered the opinion of the Court, said:

"If the transfer be to a branch of industry but remotely allied to the other and the effect of such transfer has been to supersede other methods of doing the same work the Court will look with a less critical eye upon the means employed in making the transfer."

Again he said:

"As a result of the authorities upon this subject it may be said that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to the new use."

It is quite evident that the remoteness of the uses of the two machines, with the acknowledged utility of the latter in its different field of labor, furnish the foundation of the decision.

In this connection must be borne in mind, too, the latitude of construction given to new inventions and the strict and narrow construction invariably applied in a case where the claims are for the same general subject-matter, and especially where the same person is applying for a second patent.

A case more nearly resembling complainant's, in our opinion, is that of *Thatcher Heating Co.* v. *Burtis*, (39 O. G., 587; 121 U. S., 286.)

Thatcher had obtained a patent for a heating-stove which combined three old inventions into a new and improved use and sued for an infringement thereof. He took a base-burning stove for insertion in a fireplace and combined the three elements: first, a cylinder or body projecting upward from the mantel or frame of the fireplace having within it a fuel-magazine or feature with an opening through which the magazine can be fed from above; second, the extent of the magazine or feeder to the feed-opening of the outer case, so that there may be no open space across

which to project the fuel on feeding the magazine, and, third, a feeder or magazine projecting above the top of the heater, so as to increase the capacity of the same.

It was contended on behalf of Thatcher that he found a new use for the fuel-magazine in its new situation, but obvious to those skilled in the art; that the fuel-magazine was made to perform a new function, because never before used in such structures, and that the parts of the combination cooperated to produce a new result, which assisted in securing and maintaining in fireplace-heaters a uniform and steady heat that could be regulated for use in upper rooms at will, at the same time heating the room in which it was situated by means not requiring constant attention. The magazine, extending its rim to the outer casing of the heater, was, in fact, something new. Invention was denied him, though his claim was strongly supported by the testimony of experts.

The magazine was old; but it was conceded that Thatcher made an advantageous location of it in the fireplace-heater.

The Court adopted the following from the opinion of Judge Wallace in the circuit court:

"It must be conceded that it was not obvious that such a fuel-magazine could be advantageously employed in such a heater. Attempts had been made by others to accomplish the same thing without satisfactory results, but Thatcher's organization was a success and immediately commended itself to the public. But Thatcher's principal claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization, but there was none in merely bringing those parts together. They did not perform any new function in the new arrangement. * * *

The parts did not co-operate to produce a new result. By their aggregation the new structure contains all the advantages which resided before separately in several structures. The new heater is, therefore, a better heater than any which preceded it, but it does not present a patentable combination irrespective of the means employed to adjust the several parts into efficient relations to each other."

Notwithstanding the labor and industry of the complainant have produced a structure of great usefulness, we are constrained to hold that his claims are not patentable.

It follows that the decree appealed from must be affirmed, with costs to the appellee, and it is so ordered.

RECAPITULATION.

This appeal was taken from the judgment of the court of appeals of the District of Columbia affirming a decree of the supreme court of the District of Columbia dismissing a bill in equity filed, under section 4915, Revised Statutes of the United States, by Caleb W. Durham, to obtain an adjudication that he is entitled to receive a patent for his alleged invention—an improvement in drainage apparatus for buildings.

The Commissioner of Patents, the appellee, moves to dismiss the appeal for want of jurisdiction in this court to entertain it, upon the ground that the said decision of the court of appeals is not appealable for the reasons that—

a. The matter in dispute in the case, exclusive of costs, does not exceed the sum of $5,000, no right of

property, nor right of any kind which exceeds the sum of $5,000, or can be calculated or stated in money, being involved; and

b. No question is presented or contained in the case involving the validity of any patent or copyright, or treaty or statute of or an authority exercised under the United States.

POINTS OF LAW.

APPEAL TO THIS COURT FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA:—CONTROLLED BY SECTION 8, ACT OF FEBRUARY 9, 1893.

Section 8 of the act establishing the court of appeals of the District of Columbia, and for other purposes, approved February 9, 1893 (27 Stat. L., 434, ch. 74), governs appeals to this court from the court of appeals of the District of Columbia. The section is as follows:

> That any final judgment or decree of the said court of appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States upon writ of error or appeal in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States.

That section alone governs this case. (*S. Car.* v. *Seymour*, 153 U. S., 353.)

The regulations referred to in the section (8) are contained in the *Act of March 3, 1885* (23 Stat. L., 443, ch. 355), regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories.

According to the construction by this court of both the acts of 1885 and 1893, § 8, in order to bring a case within the first provision the matter in dispute must be money, or some right the value of which can be ascertained and fixed in money, and the amount exceed $5,000, exclusive of the costs in the case (*South Carolina* v. *Seymour*, 153 U. S., 353, 357); or else, to bring the case within the second provision, without regard to the sum of money in dispute, the case must be one "wherein is involved the validity of a patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." (*S. Caro.* v. *Seymour*, 153 U. S., 357.)

THE EXACT QUESTION EXAMINED AND DETERMINED BY THE COURT OF APPEALS IN THIS SUIT—NO MONEY, NOR MONEY VALUE NOR VALIDITY OF A PATENT INVOLVED.

The exact question examined and determined in this suit by the court of appeals was whether or not Durham, the complainant, appellant herein, was "entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear." (Sec. 4915, R. S.; bill of com-

plaint and answer; opinion of the court of appeals, *Durham* v. *Seymour*, *supra*.) No sum of money was involved. The substance of the bill of complaint contained the real and the only question in the dispute, and the only question determined by the court of appeals, to wit, whether or not Durham's invention was patentable.

The record contains no statement or claim that a sum of money in excess of $5,000 was involved, nor that any sum of money was in dispute. (*Washington and Georgetown R. R. Co.* v. *Dist. of Columbia*, 146 U. S., 227 [232].) Even had the bill of complaint itself contained such an averment it would have been erroneous and contrary to the real facts in the case. The omission to make such an allegation in the bill of complaint was not a defect in it; on the contrary, such a statement manifestly would have been based upon a mere pretension.

The matter in dispute is that for which the suit is brought. (*Lee* v. *Watson*, 1 Wall., 337.) Durham brought this suit to obtain an adjudication which shall authorize the Commissioner of Patents to issue a patent to him. (Sec. 4915, R. S.; also bill of complaint, *supra*.)

In the case of *Kurtz* v. *Moffitt* (115 U. S., 487, 498), this court said, by Mr. Justice Gray, that "a jurisdiction conferred by the Congress upon any court of the United States, of suits at law or in equity, in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money."

AVERMENT OF VALUE IN THE BILL OF COMPLAINT.

The second clause of the fifth paragraph of the bill alleged "that sundry persons are making the device sought to be patented in your orator's application, and are deriving large profits therefrom, and are causing your orator great injury thereby, and that, notwithstanding the novelty and value of your orator's invention, he is wholly without protection and is being deprived of his right and is suffering irreparable injury therefrom." Paragraph 4 of the bill also averred that "his [Durham's] invention is one of great commercial value; * * * that its value is generally recognized by architects and experts in sanitary engineering."

These averments are entirely without the scope of the relief provided for by section 4915. If the invention is not patentable, it is immaterial, so far as any relief under this section is concerned, whether "sundry persons were deriving large profits therefrom" and "that its value is generally recognized." If the invention is not patentable, the alleged facts, if proved, that other persons were deriving large profits therefrom and that its value is generally recognized, could not establish that Durham is entitled to any relief under his bill. (*Olin* v. *Timken*, 155 U. S., 141.) If the invention is patentable, it is immaterial under the provisions of the section (4915) whether Durham fixed its value in excess of or below the sum of $5,000, and whether or not other persons were deriving large or small or no profits at all from it. It would be sufficient that the court found it to be patentable to authorize the Commissioner of Patents to issue a patent therefor.

The only purpose averments of the value of an invention in a bill in equity under section 4915 can subserve (?) is to lend color to the erroneous belief that they will afford a basis, in express terms, to introduce evidence to prove its value to and in the art, in order to influence the court to resolve therefrom the doubt of invention—if any should arise—in the complainant's favor and adjudge him entitled to obtain a patent. (*Webster Loom* v. *Higgins*, 105 U. S., 580, 591.) But that rule has been applied to *patents only:* after the invention has run its course of examination through the Patent Office and the Commissioner of Patents has adjudged the applicant justly entitled to a patent under the law (sec. 4893, R. S.) and issued the patent therefor. The patent, because of the examination, becomes *prima facie* evidence of the patentability of the invention secured thereby, and therefore any doubt against its validity is resolved in its favor by the courts. (*Coffin* v. *Ogden*, 18 Wall., 120.) But no such rule can be logically applied to the application and the bill in equity, which is a continuation of the application to obtain the patent (*Gandy* v. *Marble*, 122 U. S., 432), because the reason of the rule is absent therefrom. For practice under section 4915, see *Greely* v. *Commissioner of Patents* (6 Fish., 575; s. c., 1 Holmes, 284); *Prentiss* v. *Ellsworth* (2 Wharton's Digest, 365); *Ex parte Arkell* (15 Blatch., 437).

AFFIDAVITS AS TO VALUE UNAVAILING TO MAINTAIN JURISDICTION.

The affidavits of Durham, the appellant, and Allen W. Reynolds, a plumber and whilom employee of the Durham House Drainage Company, to the effect that it is their opinions that the alleged invention of Durham is worth more than $5,000, exclusive of the costs in the case, are unavailing, either to fix and establish the value of the alleged invention, which, by the way, is not the matter in dispute, nor to fix the value in money of the real matter in dispute, to wit, whether the alleged invention is patentable, for the reasons, as have already been stated, that it is impracticable, if not impossible, to calculate the value of an invention because of the inherent nature of this kind of property. In both fact and law an invention is not property, except as made so by the patent statutes, providing, among other things, for the issue of a *patent* for it. *Marsh* v. *Nicols et al.*, 128 U. S., 605. The opinion of the court of appeals denied that Durham has made a patentable invention, the effect of which, so far as Durham is concerned, is that he has no *right of property* in the alleged invention, and therefore it has no exclusive value to him determinable in money.

Knowledge on the part of the appellee that these affidavits had been filed was not had until this brief was undergoing preparation, and it was deemed too late then, and moreover unnecessary, to procure and file contradictory affidavits, but it is safe to assert that they could have been and even now can be obtained of reputable plumbers

to the effect that the value in money of the alleged invention can not be fixed, and that if it could be the amount would be far below the sum of $5,000. The testimony of Armstrong in the suit of *Durham House Drainage Company* v. *Armstrong* (36 Fed. Rep., 596), which was filed by Durham as an exhibit in this suit, shows it is Armstrong's opinion that the alleged invention has no money value, and both his action in withstanding the suit and the result of the suit confirm his opinion. Even if the value in money of an alleged idea in the useful arts could be calculated and fixed in money—for in the absence of a patent therefor it remains simply an idea and is not property in law—and it were in order to make the calculation and determination merely by *ex parte* affidavits of opinion as to its value, still such affidavits would be unavailing to an appellant where it is manifest that contradictory affidavits of equal repute might be filed to the effect that the value of the alleged invention in money is incalculable and below the sum of $5,000. (*Wilson* v. *Blair*, 119 U. S., 387; *Schunk* v. *The Moline Co.*, 147 U. S., 500.)

Durham's affidavit includes in his estimate of the money value of the alleged invention the costs of an alleged plant for manufacturing the drainage apparatus, the alleged sale of licenses to use the alleged invention, and profits which he alleges he *would have made* had he been given certain jobs of plumbing work. Not one nor all of these items have anything material to do with fixing the value in money of the alleged invention; if they have any real bearing at all on the matter they go to

substantiate the assertion that it is practically impossible to calculate and fix the value in money of the alleged invention. The evidence in the record tends to show that Durham did not have a plant to manufacture the drainage apparatus, but had the parts cast at a foundry and the threads cut by others; this evidence is material here only in so far as it appears to contradict his affidavit that it cost him $30,000 to establish a plant to manufacture and put on the market his alleged invention. However this may be, the cost of the plant to manufacture the invention is not a part of the money value of the invention. Under the rule for computing profits in a suit for infringement of a valid patent, ordinarily the rental value of the factory or the fixed charges on the capital invested in the plant are reckoned among the costs of manufacturing the infringing article, but the cost of the plant itself is not included as a part of the money value of the invention. Nor can the licenses alleged by Durham fix the value in money of his invention. The licenses could not transfer the alleged invention; they could only transfer and fix the value of the *monopoly* of the alleged invention, and that monopoly Durham has not yet obtained, and all his attempts to obtain it have signally failed. (*Lyon* v. *Donaldson*, 34 Fed. Rep., 789.)

License fees are sometimes the measure of damages in suits for infringement on a valid patent, but before any damages at all are awarded, or even inquired into, the patent must first be held to be valid and infringed. In the case of Durham, he has no patent, and even his application for the patent stands rejected. But even in in-

fringement suits it is more frequently the exception to estimate the compensation to the plaintiff by the actual damages which he proves himself to have sustained rather than to measure them by inference from the license fee. And even if it were correct and proper to use the fees in the alleged licenses granted by Durham as affording an inference of the value in money of the alleged invention, their enormous disproportion in amount only serves to establish that the money value of the alleged invention is merely a matter of conjecture and opinion. Nor have the alleged profits, stated by Durham that he *would have received*, etc., *had he had* a proper patent for his alleged invention, any material bearing in fixing the value in money of the invention. He offers no proof of cost and selling price of his invention in the contracts and gives no mode of computing them. The profits are wholly conjectural, remote and not actual, and *based on what Durham alleges would have been his profits had he obtained the jobs of work*. This is baldest assumption, and even in suit for infringement of a valid patent would not be accepted as evidence of proof of profits, let alone be accepted here by analogy to maintain an allegation of money value of an alleged invention, a patent for which every tribunal it has come before has refused.

There can be no profits in contemplation of law from a nonpatentable invention, no more than there can be profits from a void patent. Moreover, the might-have-been profits are shown by Durham's affidavit to be excessive and arbitrary, for if others could put in his drainage apparatus at a profit, it is reasonable to assume that Durham could have done so.

Reynolds's affidavit is substantially the same as Durham's, and for that reason it will not be examined further than to call attention to the last statement therein, to the effect that "deponent further states that the value *placed on** said invention is far in excess of $5,000." The words "placed on" sum up the whole substance and effect of the affidavits. It is simply a matter of *placing* a money value in excess of $5,000 and asking this court to accept such placing of value for proof of actual value, and that, too, in the face of the fact that there can be no proof of actual fixed money value because of the inherent nature of the matter in dispute, which is, Is the invention *patentable* or not? and not What is it worth in money?

In the case of *Sparrow* v. *Strong* (3 Wall., 97) in view of which it is presumed the appellant filed the affidavits, there was nothing in the record contradictory that the value of the mining claim was of the requisite sum of money, while in this case both the nature of the dispute itself and the record demonstrate that the value of the right to obtain a patent for the invention is not calculable in money. Nor is case of *Sparrow* v. *Strong* (*supra*) controlling of this appeal. (*S. Car.* v. *Seymour*, *supra*.) That a matter in dispute which is not within the statute regulating appeals to this court from the court of appeals of the District of Columbia and which, too, can not be because of its nature, can not be brought within the provisions of the statute by affidavits vouching that it is within the statute. (*Cross* v. *Burke*, 146 U. S., 83

* The italics are the brief-writer's.

(87–88); *In re Schneider*, 148 U. S., 162 (164); *Street* v. *Ferry*, 119 U. S., 385; *Wilson* v. *Blair*, *ibid.*, 387; *Abadie* v. *United States*, 149 U. S., 261.)

EVEN IF THE VALUE OF THE INVENTION TO DURHAM WAS THE MATTER IN DISPUTE, IT HAS NOT BEEN AND CAN NOT BE FIXED IN MONEY.

Even if the value of the alleged invention to Durham was the matter in dispute, it has not been and can not be fixed in money, either below or in excess of $5,000. The whole of the evidence offered by Durham was directed to the point that his drainage apparatus was new, useful, and a patentable invention. Not a single witness testified as to the value in money of the alleged invention to Durham, or to any other person. Some testified that Durham had erected the pipes and fittings constituting his invention in a number of buildings, and Durham himself gave in evidence the names of a number of buildings in which he had put in pipes and fittings embodying his alleged invention, but he did not specify the amount of money he received for them.

The amount of money he received for this work could not, however, fix the value, in money, of his invention, nor could the actual cost of the pipe and fittings do so. They are not his invention, but the mere instruments or means by which he reduced his invention to practice and put it into use. (*Sawin* v. *Guild*, 1 Gallison, 485.) Durham had no exclusive right in law to the idea—the invention he embodied in those structures of pipes and fittings—until he obtained a patent for it. (*Gayler* v. *Wilder*, 10 How., 477; *Brown* v. *Duchesne*, 19 How., 183.)

He said in his testimony that, "since the failure of our suit against Armstrong, I have lost an incalculable amount of business. I should say that I have been deprived of not less than one hundred thousand dollars of profit on my invention." This is the merest conjecture of the value in money, even if it were conceded that he had actually made a new and patentable invention. The invention had no actual money value that could be fixed upon it. The admission in his bill of complaint that Armstrong had been held free by the court from his charge of infringement is strong proof that Durham had no patentable invention, and convincing proof that it was wholly devoid of any pecuniary value that could be calculated and fixed.

The money value of a *patent* for the invention to Durham might exceed $5,000; or it might be his opinion that it would be worth in money to him over $5,000; but these are mere suppositions and opinions, and do not answer the requirement of the statute that "the matter in dispute shall exceed the sum of five thousand dollars." (*Lee* v. *Walton*, 1 Wall., 337 (339).)

It may be Armstrong's opinion that the invention is not worth a dollar; that it is not an invention at all, but an old idea. Further, it may be his opinion that even a *patent* for the alleged invention is not worth a dollar in money, or in anything of value that can be estimated and stated in money. And this may be the opinion of everyone whose opinion in the matter is worth considering. Its exchangeable value which disposes people to give money for it, and which is the kind of value meant

in the statute in estimating whether the matter in dispute exceeds the sum of $5,000, is incalculable, if it is practically anything.

It is impossible to give any practical rule by which to determine the benefit Durham may gain or the loss he may suffer from the adverse decision of the court of appeals (*Smith* v. *Adams*, 130 U. S., 167; *Cameron* v. *United States*, 146 U. S., 533; *S. Car.* v. *Seymour*, 153 U. S., 358); nor is it necessary to seek any rule, for if the invention is not patentable Durham's loss is nothing, and is imaginary and not real, while, on the other hand, if the invention is patentable, it is immaterial whether or not it has any money value. But, to repeat, the decision of the court of appeals did not involve any question of money at all. Nor does the bill of complaint or evidence disclose any matter involving a sum of money. (*Columbian Ins. Co.* v. *Wheelwright*, 7 Wheat., 534; *United States* v. *Addison*, 22 How., 174; *Smith* v. *Whitney*, 116 U. S., 167; *United States* v. *Wannamaker*, 147 U. S., 149.)

NO RIGHT OF ANY KIND WHICH EXCEEDS THE SUM OF $5,000 INVOLVED.

It is superfluous to go over this matter again in order to point out that no right of any kind which exceeds the sum of $5,000 is involved, for in treating of the amount of money, $5,000, there was shown along with it that no right of property of any kind which has a money value or can be ascertained and fixed in money, was drawn in question in the decision of the court of appeals.

Durham has no property rights in the alleged invention until he obtains a patent for it. (*Brown* v. *Duchesne*, 19 How., 183.) The inchoate right to obtain a patent for it may be the subject of bargain and sale and its value in money agreed on (*Hammond et al.* v. *Mason & Hamlin Organ Company*, 92 U. S., 724, 728), but stripped of the right to obtain a patent for the invention, thereby securing its exclusive use, it has absolutely no value as property or right of property of any kind which can be estimated and fixed in money. Our patent system has recognized this by the manner in which it pays an inventor for his invention. It does not attempt to ascertain and fix the value in money of his invention, but grants him the exclusive right to use it for a term of years. Our patent-law makers knew from the experience of England, our predecessor in the matter of issuing patents for inventions, that a system of money award to inventors had been universally condemned, even by its friends, because there was absolutely no just rule to ascertain and fix the value in money of an inventon.

For instance, when Dr. Roebuck became bankrupt, even Watt's steam engine was considered of so little value that it was not included in the assets; Cort's two famous inventions were valued by Parliamentary commissioners at £100, though they awarded £2,500 to a John Blake to assist him in carrying out his scheme of transporting fish to London; Neilson's hot blast was ridiculed by ironmasters, though, before the term of his patent expired, the invention is said to have saved £12,000,000 to the

Kingdom. And in our own country there are many reputed instances of the folly of attempting to calculate and fix the value of patented inventions in money.

It has been written that a better and more equable method of providing a return to the inventor could not be devised than that of a temporary monopoly—a letters patent—since it leaves the payment of the inventor to time, which must determine the *real* value of a new thing to the public. It is just that the invention should be paid for by those who use it in proportion to its value to them, and the profit derived from it—its money value—can be ascertained only from its cost of manufacture and selling price.

To use the words of Bentham—

> It (a patent of invention) is an instance of a reward peculiarly adapted to the nature of the service, and adapts itself with the utmost nicety to those rules of proportion to which it is most difficult for reward, artificially instituted by the legislature, to confer. If confined, as it ought to be, to the precise point in which the originality of the invention consists, it is conferred with the least possible waste of expense. * * * It is "variable, equable, commensurable, characteristic, frugal, promotive of perseverance, subservient to compensation, popular, and reasonable."

It is hardly accurate even to say that the patent laws recognize *an invention* as property. It would seem more correct to state that they recognize that the *disclosure* of an invention to the public is of value to the public, and that the inventor who performs this service for them is entitled to payment therefor, and for the purpose of secur-

ing him this payment they have created and conferred upon him a temporary property in the invention by means of letters patent.

THE VALIDITY OF A PATENT IS NOT INVOLVED.

No question is contained in the record "involving the validity of a patent." It will hardly be contended by the appellant that his bill of complaint related to or in any wise drew into discussion and decision the validity of a patent. A bill in equity and a patent are legally as well as physically two wholly separate and different things. A bill in equity, filed under section 4915, is brought to obtain a patent, but the patent, if obtained through the adjudication of the court upon the evidence to support the bill, does not include the bill in equity (sec. 4884). "Upon the applicant filing in the Patent Office a copy of the adjudication," if it be in his favor, and "otherwise complying with the requirements of law," it shall authorize the Commissioner of Patents to issue a patent (sec. 4915).

The bill in equity under section 4915, to obtain a patent is by analogy the equivalent in the court of an application to the Commissioner of Patents to obtain it (*Gandy* v. *Marble, Comm'r*, 122 U. S., 432; *Morgan* v. *Daniels*, 153 U. S., 120). Certainly no one has ever maintained that the application for the patent and the patent are the same thing, or that the rejection of an application involved the validity of a patent. (*Bate* v. *Sulzberger*, 157 U. S., 1.) Sections 4888 to 4893, Revised Statutes, both inclusive, define what an application is, while sections 4884 and 4885 define what a patent is.

In considering whether or not this court has jurisdiction of this appeal, the matter may also be looked at in the light of the effect a decision of this court announcing it has jurisdiction would have upon the examination of applications for patents for inventions. This court held, substantially, in *Gaudy* v. *Marble* (122 U. S., 432), that a proceeding by bill in equity under section 4915 to obtain the patent was a continuation of the prosecution of the application for the patent filed in the Patent Office. This appeal, then, is a continuation of Durham's original efforts in the Patent Office to obtain a patent, and should this court entertain the appeal, the singular spectacle will be seen of the Supreme Court of the United States examining applications for patents. The examination would not stop with nor be confined to this (Durham's) application, but every unsuccessful applicant in the Patent Office, naturally, would appeal his case to this court, in order to have it pass upon the patentability of his invention. Under this practice, however, a most singular anomaly would occur: This court, although having decreed, for instance, that the patent be issued (4915), nevertheless, it would be precluded from reviewing a decree of a circuit court of appeals in a suit for infringement declaring the patent void. (Circuit courts of appeals act, March 3, 1891, ch. 517; *United States of America* v. *Amer. Bell Tel. Company and Emile Berliner*, —— U. S. ——, decided November 11, 1895.)

The inconsistency and anomaly of the Supreme Court undergoing the work of examining applications for patents is so striking that it would not escape the notice even of

a theorist, to say nothing of how a suggestion of the kind would appear to practical administrators and interpreters of the patent law. The avowed purpose of the circuit courts of appeals act was "to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance," and as a part of that burden consisted of "patent cases," the act made the decisions of the circuit courts of appeals in patent cases final; so that if a defeated applicant to an interference in the Patent Office should file a bill in equity, under section 4915, against his successful contestant, the patentee, in the circuit court for the southern district of New York, let us assume, and receive an adverse decree on appeal from the circuit court of appeals for that circuit, the decree would be final. If, however, the patentee shall be in the jurisdiction of the District of Columbia, the defeated applicant may appeal to the Supreme Court of the United States. To state the difference is to demonstrate the irregularities, inconsistencies, and anomalies such a practice would involve.

In contested cases the decree of the circuit court of appeals would be final, unless the respondent is in the jurisdiction of the District of Columbia or the Territories, while in *ex parte* applications for patents, as the bill must be filed in the courts of the District of Columbia (*Butterworth* v. *Hill*, 114 U. S., 128), the unsuccessful applicant may have the Supreme Court of the United States examine his application, though he may not have it review the decree of the circuit court of appeals declaring the patent void. It is to this that this line of argument brings us.

Aside from the inconsistency of such a construction of the patent law and jurisdictional statutes, an inconvenience equally as onerous would result to this court should it hold that it has jurisdiction to hear and decide this appeal, in the new burden it would place upon the court in the number of applications it would have to examine and the amount of work involved in such examinations. It would be a small estimate to guess that this court would have one hundred applications in a court year (of eight months) to examine and decide, each of which would require as much time of the court as if it were a case involving a patent instead of an application for the patent. No actual count of cases has been made, but it is assumed that this court did not hear and decide, when it had jurisdiction, more than one hundred patent cases in a court year, and to be rid of them by the circuit courts of appeals' act only to be burdened by applications for the patents—the least important of the two kinds of cases—is in direct conflict with the object of the circuit courts of appeals' act. This line of argument is not addressed to the court from an inconvenience or to the person, but is an argument from authority as disclosed by the patent statutes and the statutes defining the jurisdiction of this court in appeals from the decrees of the circuit court of appeals and the court of appeals of the District of Columbia.

Aside from all these things this court, in *The United States of America* v. *The American Bell Telephone Company* (*supra*), said, "Now, * * * suits to obtain patents are suits which arise under the patent laws * * * coming within the avowed purpose of the act" (circuit

court of appeals of 1891), indicating that the decree of a circuit court of appeals in a suit under section 4915 is final; and by accepting the line of reasoning by this court, explaining the inducement for establishing the circuit courts of appeals, it is allowable and just to infer that a decree of the court of appeals of the District of Columbia is also final in this, a patent case, for the same reason. It is not necessary, however, to argue by analogy in this appeal, because the statute which governs the appeal—the act of February 9, 1893—is express in its language, and this court has already announced that it alone governs appeals to this court from the court of appeals of the District of Columbia. (*South Carolina* v. *Seymour*, *supra*.)

Without pursuing this point further, it is respectfully submitted that both the bill of complaint and opinion of the court of appeals show beyond the semblance of refutation that no question was presented in this case "involving the validity of a patent."

THE CASE OF GANDY V. MARBLE NOT A PRECEDENT FOR THIS APPEAL.

The cases of *Butterworth* v. *Hoe* (112 U. S., 50); *Butterworth* v. *Hill* (114 U. S., 128); *Gandy* v. *Marble* (122 U. S., 432), and *Morgan* v. *Daniels* (153 U. S., 120), are not authority on the question of want of jurisdiction or not in this court to hear and determine the appeal in this case.

The question of want of jurisdiction was not raised in any of these cases. *Butterworth* v. *Hoe* was decided prior to the act of March 3, 1885, regulating appeals to this

court from the District of Columbia. *Butterworth* v. *Hill* and *Morgan* v. *Daniels* were appealed from the districts of Vermont and Massachusetts, respectively, under an act different from the act of March 3, 1885, *supra*, nor was the question of jurisdiction over them raised and considered by this court. *Gandy* v. *Marble* is the only one of the number that was appealed from the courts of the District of Columbia after the date of the act of March, 1885, *supra*, but the lack of jurisdiction of this court to hear and determine it was not raised. If the point of no jurisdiction was perceived by the appellee it was not made, nor did this court suggest it, nor allude to it in the opinion. Upon an examination of the case in question it would appear that the want of jurisdiction in this court to hear and determine it was overlooked, and it can not serve as a precedent for the exercise of jurisdiction by this court over this appeal. (*Snow* v. *United States*, 118 U. S., 346; *Cannon* v. *United States*, *ibid.*, 355.) Nor can jurisdiction of this appeal be conferred on this court by the litigants therein omitting purposely to raise the question of lack of jurisdiction, for it is a matter which would spontaneously force itself upon the attention of the court at the very beginning of the statement of the merits of the case by the appellant. (*Snow* v. *United States*, *supra*.)

It is respectfully submitted that the appeal should be dismissed for want of jurisdiction in this court to entertain it.

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